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ENGLISH

RAILROAD CASES

A COLLECTION OF ALL THE

RAILROAD CASES IN THE COURTS OF LAST RESORT
IN AMERICA AND ENGLAND.

VOL. VI.

NORTHPORT, NEW YORK
EDWARD THOMPSON

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BURGESS MASON

v.

THE MISSOURI PACIFIC RY. CO.

(*Advance Case, Kansas. February*, 1882.)

As a general legal proposition, where both parties are guilty of gross negligence, the plaintiff cannot recover damages sustained by the negligence of the defendant.

Where a railway company has constructed a trestle-work or bridge over a street and creek, laid out on the plat of Wyandotte City, and at a place where the street has not been graded or improved, and the trestle-work, with a span of one hundred feet, extends over a stream sixty feet wide, with perpendicular banks from fifteen to twenty feet high, and is thirty feet above the water in the creek, and the water under the trestle-work is from three to six feet deep, and there are no railings to the trestle work or bridge, and no foot planks upon it, and the only way of crossing such trestle-work or bridge is by stepping from tie to tie, and the railway company is constantly using the track on such trestle-work or bridge for the operation of its engines and cars, and a party climbs up and attempts to cross such trestle-work or bridge without the consent of the company, and is injured by being run over with a hand-car operated on the track lying on such trestle-work or bridge; *Held*, in an action for the recovery of damages for such injury, the court commits no error in ruling out the evidence concerning the custom of foot passengers crossing such trestle-work or bridge, after two persons had testified to it without objection.

A railway company has exclusive right to occupy, use and enjoy its railway tracks, trestle-work and bridges, and such exclusive right is absolutely necessary to enable it to properly perform its duties, and any person walking upon a track or bridge, or any part of the same, of a railway track without the consent of the company, is held in law to be there wrongfully, and therefore to be a trespasser; and in case of an injury happening to such person while so trespassing upon it, from the movement or operation of the cars of the company over it, he is without remedy unless it be proved by affirmative evidence that the injuries resulted from negligence so gross as to amount to wantonness.

ACTION brought by Burgess Mason against the Missouri Pacific Ry. Co. for damages sustained by him in the loss of the services of his wife, Emma Mason, and expenses attending her attempted cure, on account of personal injuries received by the wife about the 5th of November, 1879, from the railway company while the latter was walking across the railway bridge over Jersey Creek in the city of Wyandotte. Trial had at the April term of the District Court of Wyandotte County, for 1881. The jury returned a verdict for the defendant company, and with such verdict also the following questions and answers:

1. Was plaintiff's wife chargeable with only slight negligence in crossing defendant's bridge?
Gross negligence.
2. Did she use her utmost efforts to get out of the way of the car, from the time she was notified of its approach?
No.
3. Could she have stepped off the bridge to one side of the way of the car at any point after hearing the alarm till the car struck her?
Yes.
4. Could the section boss, Con. Curtin, and his five associates have checked up the car after seeing her, and before striking her, had they chose to do so?
No.
5. What was the rate of speed per hour the car was running when coming towards plaintiff's wife?
Twelve miles.
6. Was defendant guilty of gross and wanton negligence in running its car over her?
No.
7. Was she run over between Summunderwot Street on the south, and Garrett Street on the north?
Don't know.
8. Did the men on the hand-car exercise ordinary care and prudence to avoid injuring the plaintiff's wife?
Yes.
9. Did the men on the hand-car, after they discovered plaintiff's wife, exercise ordinary care and prudence to avoid injuring her?
Yes.
10. Under all the facts and circumstances in this case, did the plaintiff's wife exercise ordinary care and prudence?
No.
11. Was the plaintiff's wife guilty of any negligence in whole or in part, directly contributing to her injuries?
Yes.
12. Under the facts and circumstances of this case, did the plaintiff's wife exercise any care and prudence?
No.
Judgment was rendered for the railway company, and plaintiff brings the case here.

HORTON, C. J.—Several objections are made by the plaintiff to the rulings of the court in rejecting evidence offered at the trial, and several exceptions are taken to the refusal of the court to give the special instructions asked for by plaintiff, as also to several of the instructions given to the jury. In view of the character of the special finding of facts returned by the jury, it is unnecessary

to note only those matters of evidence and those instructions that affect the conduct of plaintiff's wife. The jury found that the wife was chargeable with gross negligence in crossing the railway company's bridge, and unless this or the other similar findings of the jury can be imputed to erroneous rulings of the court, no new trial ought to be granted, as the plaintiff upon such a finding is not entitled to any recovery. Even if we assume that the court erred in refusing to instruct the jury that it was gross and wanton negligence on the part of the defendant to run its cars at a greater speed than four miles an hour within the limits of the city of Wyandotte, in violation of an ordinance of the city prohibiting a greater speed, nevertheless, plaintiff could not be prejudiced thereby, because, if both Emma Mason and the agents and the servants of the defendant were guilty of gross negligence contributing to the injuries complained of, the defendant would be entitled to the general verdict rendered in its favor by the jury, as it is a correct legal proposition that when both parties are guilty of gross negligence, as a general rule—liable it may be to some exceptions—the plaintiff cannot recover. In this case, although the action is in the name of the husband, yet, if the wife was guilty of gross negligence, the husband would not be entitled to damages for her injury. Plaintiff complains that the court erred in ruling out evidence concerning the custom of foot passengers crossing the bridge over Jersey Creek, where his wife was injured, after two witnesses had testified thereto without objection. Unless the evidence was competent, the admission of like evidence in the first instance is no bar to the exclusion of other and further evidence of that character. Because some incompetent evidence is admitted without objection, other incompetent evidence is not thereby competent, if offered to prove the same fact. It appears from the record that the plaintiff, about the time she received her injuries, was going to her home. Instead of going upon Third Street in the city, which was graded and sidewalked, she attempted to reach her home by a nearer route; in taking this course it was necessary to cross Jersey Creek a few rods above where it empties into the Missouri River. The only way of crossing this stream at this place was by climbing upon the embankment of defendant's railway, and passing from this upon the trestlework of the road over Jersey Creek, by stepping from tie to tie. This the wife attempted to do. At the place where the trestle is located the streets, as laid out on the plat of Wyandotte city, are unused for general travel, and at such place the streets have not been graded or improved. The bridge over the creek is iron, and has over one hundred foot span. It is thirty feet from the top of the trestle to the water in the creek, and the water under the trestle is from three to six feet deep. The embankment at the south end of the bridge is four or five feet at fill, and fifteen feet at creek; and on north side eight to ten feet at fill, and twenty feet

at creek. Jersey Creek is about sixty feet wide at the bridge, and the banks on each side are perpendicular, and from fifteen to twenty feet high. There are no railings to the bridge, and no foot planks to walk upon. Considering the character of the structure erected, and the use to which it is applied by the defendant, we do not think there was any error in refusing to admit further evidence concerning foot passengers crossing it. It cannot be well said that such trestle-work and bridge, as constructed, were either in law or in fact a public street.

As there was no attempt to show that either the injured party or any other person was invited by the company to cross or travel upon the structure over the creek, or that the injured party was upon the structure with the consent of the company, the fact that other parties had crossed upon it did not make it less dangerous or less negligent for the wife of the plaintiff to attempt to do so. This is not a case where the legal right of the railway company and that of the public to use such trestle-work was about equal. The embankment and trestle-work are so much elevated above the street, and are so erected for the purpose of operating thereon cars and engines only, as to apparently forbid foot passengers crossing the creek at this place; therefore, we do not think that the railway company was bound to operate its cars with reference to footmen undertaking the peril of attempting to step from tie to tie in crossing the long span over the stream, especially in view of the frequent running of the cars on the track on such trestle-work. Counsel for plaintiff contends that as the bridge lay wholly within two of the streets of the city of Wyandotte, called Front Street and Wawas Street, which cross each other at the point where the bridge crosses the creek, and as a street belongs to the public from the centre of the earth to the heavens above, persons had the right to climb up the embankment and to use the trestle-work as a public street of the city. Not so. The embankment and trestle-work were the property of the railway company. It was used for the purposes of the company in operating its cars and trains, and so built and constructed as to render any travel thereon perilous, even without the operation of cars upon the track. Whether the authorities consented to the construction of such embankment and trestle-work, is immaterial at this time. The railway company was in full occupation of it, and the public had no right to cross over such a dangerous structure, and knowing it to be unsafe for travel, to claim exemption from all negligence on their part, and charge the railway company with the fruits of their own imprudence.

This leads us to the consideration of the instruction given by the court, to the effect that if the plaintiff's wife was injured at a point not on the surface of a public highway or travelled street, but upon the trestle or embankment of the defendant's road-bed, then she had no right to be there, and was a trespasser, and if injured

while trespassing by the act or negligence of the defendant's employees, before the defendant could be held legally responsible for such negligence of its employees, the negligence must be so gross as to amount to wantonness. Whenever a party infringes upon the rights of others, this negligence, or this wrong doing, as the case may be, absolves others from using ordinary care and diligence towards such party. In brief, they are under no legal or moral obligation to be cautious and circumspect towards one who infringes upon their rights. U. P. Ry. Co. *v.* Rollins, 5 Kan. 167. A railway company has the exclusive right to occupy, use and enjoy its railway tracks, bridges and trestle-work, and such exclusive right is absolutely necessary to enable such a company to properly perform its duties; and any person going upon or using or occupying the track or bridge of a railway company without the consent of the company, is held in law to be there wrongfully, and therefore to be a trespasser. Now, as the point where the plaintiff's wife was injured was not on the surface of a public highway or travelled street, but upon the trestle-work or embankment of the defendant's road-bed, for all the purposes of this case, the railway company had the exclusive right to occupy, use and enjoy such trestle-work and embankment; therefore, the instruction that the railway company was liable only for such negligence so gross as to amount to wantonness was a correct declaration of the law to the jury. The plaintiff's wife climbed up the embankment and attempted to cross the trestle-work or bridge without the consent of the company, and at her own peril, and the husband can recover only for injuries done to her for such negligence of the employees of the company as was so gross as to amount to wantonness. The judgment of the district court will be affirmed.

All the justices concurring.

See note, p. 17.

Louisville and Nashville R. R. Co.

v.

Cooper's Admr.

(Advance Cases, Kentucky. February 28, 1882.)

In an action against a railroad company for running over and killing the plaintiff's intestate, it appeared that the deceased was a full grown man, but was deaf and dumb, and that at the time of the accident he was walking on the track of the company in the same direction as the train that killed him. The evidence was conflicting as to whether any whistle or bell was sounded

by the train, so as to warn the deceased of his danger, and if so when it was sounded. The court instructed the jury that if those in charge of the train saw the plaintiff's intestate in time by the use of the means in their power to have saved his life by checking the train or by blowing the whistle and ringing the bell, and the defendant's employees wilfully failed to use such means to avoid the killing, they must find for the plaintiff. *Held*, that this instruction was erroneous. The jury should have been told that the defendant's employees, being ignorant of the physical infirmity of deceased, had a right to believe that he would do what a man possessed of his ordinary faculties would have done, viz., stepped off the track in time to avoid danger, when he heard the approaching train, and that hence they were not in fault for failing to stop the train.

Semble, that if knowledge of the physical infirmities of the deceased had been brought home to said employees they would have been held to a stricter measure of duty, and that a failure on their part to discharge that duty would have constituted either absolute intentional killing or wilful neglect, for which the company would have been held liable.

BY THE COURT.—The appellant's intestate was run over and killed by a train of cars, operated by the employees of the Louisville and Nashville R. R. Co., on its Knoxville branch, near St. Mary's Station, in the County of Marion. He was a deaf-mute, and when killed was walking on the track of the railroad in the same direction the train was going, and at a point in the road where there was no crossing and where the intestate had no right to use the road or any part of it as an ordinary highway. It seems that the deceased was from the State of Texas, and at the time of his accident was on his way to visit some relatives in this State. This action was instituted against the company, the representative of the deceased alleging that the death of his intestate was caused by the negligence of those in charge of the train. A verdict for one thousand dollars was rendered and judgment entered accordingly, of which the railroad company complains. The only testimony in the case upon the issue made as to negligence was, whether the employees of the train, after seeing the intestate upon the track, could by the exercise of proper care and diligence have avoided the injury.

An instruction was given in behalf of the appellee to the effect, "that if those in charge of the train saw the plaintiff's intestate in time, by the use of the means in their power to have saved his life by checking up the train, or by blowing the whistle and ringing the bell, and the defendant's employees wilfully failed to use such means to avoid the killing, etc., they must find for the plaintiff."

There is conflicting testimony as to the time the alarm was given by the employees, the witnesses for the plaintiff saying they heard no alarm or warning until after the accident, while others who were passengers on the train say they heard the whistle, the ringing of the bell, and upon looking out saw the deceased about fifty yards in advance of the train, and in fact saw him when struck by it. The train was running at the rate of twenty-five or

thirty miles an hour, and on a descending grade at the time of the accident.

The company is bound to a high degree of care in running its trains, in order to prevent the taking of human life, and this care and caution must be exercised when the danger is apparent or when those in charge of the train as reasonable and prudent men should be apprised of the danger. In this case the deceased, so far as the company is concerned, must be regarded as in full possession of all his senses, as there is an entire absence of proof showing a knowledge by any of the employees of his unfortunate condition. He was seen by the employees some two or three hundred yards in advance of the train, walking leisurely on its track, and, being a full-grown man and with ample room on each side of the track for him to avoid any injury from the approaching train, those in charge of the train had the right to believe that he would leave the track, and, if he could have heard the approach of the train, no doubt would have stepped off the track and avoided all danger. Neither the ringing of the bell nor the blowing of the whistle or any other similar warning would have apprised him of his danger; yet the company, upon the facts of this particular case, not being aware of his condition, should have exercised the same degree of care that its employees are required to exercise with reference to those who were capable of hearing or understanding the warning given; if aware of his condition it was their duty to stop the train at once. Those in charge of the train had the right to believe that the deceased deaf man would exercise at least ordinary care and caution on his part, and if he failed to do this, his death was the cause of his own recklessness and improvidence, unless the employees knew or had, as ordinary prudent men, reason to believe that the injury would occur unless the train was checked.

If the killing was intentional, or the result of wilful neglect, the failure to exercise the proper care by the deceased will not excuce, but the facts upon which this knowledge of danger is brought home to the employees must be made to appear. In the absence of such facts the deceased must be regarded as the author of his own misfortune. The mere fact that the deceased was seen upon the track is not sufficient to authorize the jury to say that the employees were guilty of wilful neglect, or the Court to instruct the jury that it was the duty of those in charge of the train when they saw the deceased on the track to use the means within their power to prevent the injury. Such is not the law. If this had been a child on the track the employees should have exercised greater care, because it was reasonable to suppose that one of tender years would not be aware of the danger; but where the party injured is an adult, although deficient in hearing, he must be treated as one of ordinary intelligence unless his misfortunes are known. There have been two verdicts in this case. The first verdict under similar

instructions was for $250, and the present verdict for $1000. The first verdict was set aside and a new trial granted, and the evidence and instructions on each trial have been considered.

The judgment below is reversed and cause remanded for proceedings consistent with this opinion.

Shearman & Redfield, On Negligence, page 56, sec. 51; P. and M. R. R. *v.* Krehl, 12 Bush.

See note, p. 17.

TEUNENBROOCK, Appellant,

v.

SOUTHERN PACIFIC COAST R. R. Co., Respondent.

(*Advance Cases, California. December* 28, 1881.)

For the free use of its passenger and other trains a railroad company is entitled to the possession of its roadway. The travelling public has no right to the possession of it, nor the use of it, except at crossings and other places of public passage. But if persons travelling on a railroad track are seen in time to avoid danger, by warning them off by proper signals, such as ringing a bell, sounding a whistle, slowing down, or stopping the train, it is the duty of the officers of the train to resort to such means to prevent injury to the life or limb even of trespassers on the road.

No duty is imposed upon the engineer of a railroad train to sound a whistle in the lawful use of the roadway, except in approaching crossings on a road, or other places of public passage, or in coming to stations, or into towns or cities. Accordingly, *held*, defendant was not responsible for injuries occasioned while it, without fault, was running its train at the customary speed and without sounding a whistle, at a portion of the road not approaching a crossing or place of public passage, but upon a trestle bridge crossing a ravine about a mile from a station. *Held*, further, plaintiff was guilty of contributory negligence.

APPEAL from Superior Court, Santa Clara County.

Lieb and Richards, for appellant.

Moore, Laine & Johnson and McKisick & Rankin, for respondent.

McKEE, J., delivered the opinion of the court:

Appeal from a judgment of nonsuit in an action to recover damages for personal injuries caused, as alleged, by the negligent and careless management of an engine and train of cars by officers of the respondent.

The evidence upon which the appellant, and plaintiff in the action, rested his right to recover showed that, about November 26, 1879, the respondent had constructed its roadway from the Santa Clara Valley up a rough canyon in the Santa Cruz range of moun-

tains, winding around the curves of the mountain to the mouth of a tunnel under the crest of the mountain, at a few feet from which the company had established a station, known as Wright's Station. About a mile from this station, coming down to the Santa Clara Valley, part of the roadway was a trestle, two hundred and seventy-seven feet long and thirty-five feet high, spanning a ravine near the end of a curve of the mountain. As the tunnel under the crest of the mountain was unfinished, trains were run over the road only as far as Wright's Station. A day or two before the accident to the appellant an explosion had taken place in the tunnel which killed many of the men at work in it and destroyed property in and about it; and a day or two after the explosion the appellant and a companion, both of whom lived near the line of the railroad, started up the canyon to go to "Wright's" for the purpose of seeing the effects of the explosion. They travelled afoot all the way up, over the roadway of the respondent, and as they met with no trains on the way, they arrived safely at "Wright's." After satisfying their curiosity they started from "Wright's" between three and four o'clock in the afternoon of the same day, to return home by the same way they came—travelling afoot down the mountain over the railroad. Before starting they saw three or four cars and an engine at "Wright's;" but, thinking that no more trains were to be run over the road that day, they asked no questions of any one on the subject. On their way down they got about half way over the trestle when they heard the sound of a train coming from "Wright's," and on looking back they saw the train rounding the curve on the trestle, without sounding a whistle. At first they attempted to run to the end of the trestle, but, finding they could not escape in that way, they left the track clear for the train by swinging themselves over the guard rails of the trestle, and in this pendent position over the ravine they maintained themselves until the train passed. It passed without injuring them, and the appellant's companion pulled himself up on to the trestle and went to the assistance of the appellant; but he, although aided by his companion, was unable to get up, and he fell over the rocks below in the ravine, receiving from the fall serious personal injuries. And it is contended in his behalf that, because the officers of the respondent started the train from Wright's Station and it ran down the grade on to the trestle without sounding a whistle, they were guilty of negligence which caused the injuries to the appellant.

But there was no duty imposed upon the engineer of the train to sound a whistle in the lawful use of the roadway, except in approaching crossings on the road or other places of public passage, or in coming to stations or into towns or cities. The paramount duty of a railroad company is the safe carriage of passengers; and in the discharge of that duty the law imposes upon them the utmost care and diligence in keeping their track clear. Hence,

for the free use of their passenger and other trains, they are entitled to the possession of their roadway. The travelling public has no right to the possession of it, or to the use of it, except at crossings or other places of public passage. Travelling on the railroad, afoot or on horseback, away from crossings, is, therefore, unlawful; and persons thus using a railroad are trespassers, to whom the railroad company stand in no special relation and owe no particular duty, except such as may arise from circumstances in which persons on the roadway are injured by passing trains. But the officers of the company having the right to a free track for their trains as against all trespassers, had the right to presume that the track was clear, and that there were no trespassers upon it. In acting upon that presumption they were not at fault in running their train at its customary speed without sounding a whistle. The omission of the engineer of the train to sound a whistle under such circumstances was, therefore, not negligence. The negligence was in those who were travelling upon the road. By using the roadway for that purpose the appellant voluntarily put himself in a position of imminent danger to his person from trains which officers of the company might be running over the road in ordinary pursuit of the company's legalized business, and brought upon himself the necessity of resorting to means of escape from it which were the proximate cause of the accident which happened to him and of the injuries which he received. As his own negligence, therefore, contributed proximately to the injuries of which he complains, the respondent cannot be held liable, unless the injuries resulted from a wanton and wilful act on the part of the officers of the train while engaged in the reasonable discharge of their duties. (Manmus *v.* Champion, 40 Cal. 121.)

Of course the mere fact that persons are wrongfully travelling on a railroad, afoot or on horseback, does not authorize officers of the company in charge of a train to run down such persons or to wantonly inflict injuries upon them. If persons in that position are seen in time to avoid danger, by warning them off by proper signals, such as ringing a bell or sounding a whistle, or slowing down, or stopping their train, it is the duty of the officers to resort to such means to prevent injury to the life or limb even of wrongdoers. The duty arises out of the circumstances of the situation, and it is as imperative upon them as any other duty. But if persons in that situation are unseen by the officers in charge of a train until too late, in the exercise of ordinary care and diligence, appropriate to the duties which they have to perform for their employers to prevent injuries to others, or to resort to any means in their power for that purpose, the company are not liable.

There is no evidence tending to prove that the officers of the train were guilty of any wanton or wilful act towards the appellant. Under the circumstances in which both parties were placed

neither could see the other until the train came around the corner on to the trestle-work, unexpectedly, almost upon the appellant. The appellant knew of the train on the track, for he had seen it at Wright's Station before he started down the grade; but the officers of the train, according to the evidence, did not know, and had no right to presume, the presence of the appellant on the trestle; and the evidence does not tend to prove that they saw him in time to stop the train by reversing their engine before coming upon him. The entire circumstances of the situation, as proved by the appellant, rebut the presumption that the injuries resulted from any neglect of duty on the part of the respondent; and they established the fact that the negligence of the appellant contributed to the accident in which he sustained his injuries.

The judgment of nonsuit is therefore correct, and it is affirmed.

CONCURRING OPINION.

We concur in the judgment, on the ground that the plaintiff was guilty of contributory negligence.

McKinstry, J.; Ross, J.

See note, p. 17.

The H. and T. C. Ry. Co.

v.

Wm. J. Sympkins.

(54 *Texas Reports*, 615. *March 29th*, 1881.)

If one who enters upon the track of a railway when no train is in sight, should, from providential cause, become insensible while there, and in that condition be run over and injured by a train while lying in open view, the company would be liable in damages on account of that negligence on the part of its agents in not discovering the helpless man, which was the proximate cause of the injury.

The doctrine that a railway company owes no duty to one unlawfully on its track, and is not liable in damages for injury to such an one unless wantonly inflicted, discussed and disapproved.

A reasonable look-out, varying according to the danger and all the surrounding circumstances, is a duty always devolving on those in charge of a railway train in motion.

Railway companies are bound to exercise their dangerous business with due care to avoid injury to others, and when they fail to do so, they are liable in damages for injury resulting even to a trespasser who has not been guilty of contributory negligence.

One who, while helpless from drunkenness, is run over and injured by a passing railway train, is guilty of contributory negligence, which constitutes a bar to his action for damages, unless his injuries were wantonly or wilfully inflicted.

If the proximate cause of injury to one run over and maimed by a railway train is the negligence of the engineer in charge, and the party injured is prevented by a providential dispensation from the use of his faculties at the time of the injury, the fact that prior to the time of the injury, when no train was in view, and before being providentially disabled, the injured party placed himself wrongfully on the track of the road, would not constitute such contributory negligence as would prevent a recovery.

APPEAL from Harris. Tried below before the Hon. James Masterson.

The opinion states the case.

Geo. Goldthwaite, for appellant.

I. The court erred in so much of the first paragraph of the charge as instructed the jury: "But if the evidence satisfy the jury that the agents, employees or servants in charge were guilty of gross negligence—by which you will understand the absence of such ordinary and proper care as was their duty to have observed; or, if the evidence satisfy you that defendant's cars were not properly manned and equipped, and if the same had been the accident would not have happened. If so you find the facts, find for plaintiff."

II. The plaintiff was not in a position to complain of defendant and hold it responsible for not having its cars properly manned and equipped.

III. That a railway company should have its train properly manned and equipped, is a duty which it owes to its passengers and persons rightfully on its track; it is not a duty owing to persons who are carelessly and wrongfully on the track.

IV. The charge was calculated to mislead the jurors, and did mislead them, inducing them to the conclusion that the defendant owed the same measure of duty and accountability to strangers and persons negligently and wrongfully on its railway track, that it owed to its passengers and persons rightfully on its track. Shearman and Redfield on Negligence, secs. 487, 493; Wharton on Negligence, secs. 389, 803; Tonewanda R. R. Co. *v.* Munger, 5 Denio, 266; same case affirmed in 4 Comstock, 349; Law Register, N. S., vol. 7, 450; R. R. Co. *v.* Worton, 24 Penn. St. 468; R. R. Co. *v.* Spearen, 47 Penn. St. 300; Nicholson *v.* R. R. Co., 41 N. Y. 529; Terry *v.* R. R. Co., 22 Barb. 586; R. R. Co. *v.* Hummell, 44 Penn. St. 378; Brown *v.* Lynn, 7 Casey (Penn. St.), 510; Reeves *v.* R. R. Co., 6 Penn. St. 454; Gillis *v.* R. R. Co., 59 Penn. St. 142; Kay *v.* R. R. Co., 65 Penn. St. 273; Herring *v.* R. R. Co., 10 Ired. (N. C.) Law, 402; Richardson *v.* R. R. Co., 8 Rich. (S. C.) Law, 120; Finlayson *v.* R. R. Co., 1 Dillon, 583.

V. The court erred in withholding from the consideration of the jury the question of contributory negligence on the part of the plaintiff, and particularly the question as to whether he was drunk;

especially after the submission of the question whether he was laboring under a providential infliction in the way of a fit. 52 Tex. 173; Shearman and Redfield on Negligence, § 25; R. R. Co. v. Hutchison, 47 Ill. 410.

Turner and Baker & Botts, also for appellant.

F. W. Henderson, for appellee.—Although defendant is not bound to that degree of diligence to one who is on its road-bed at a place where there is no public crossing, as to passengers, or to persons who are upon the road-bed at a public crossing, yet defendant cannot run their cars with their eyes shut or blindfolded, or without using at least ordinary diligence, and if by using proper diligence such as a reasonable man would have used, the accident would not have happened, then the defendants are liable even to a trespasser. Norris v. Litchfield, 35 N. H.; Vaughan v. Manlove, 3 Bing. N. C. 486; Maryatt v. Stanley, 1 M. and G. 558; Chicago and Northwestern R. R. Co. v. Barrie, 55 Ill. 226, 1870; Ill. Cent. R. R. Co. v. Baches, id. 379; La Fayette and Indianapolis R. R. Co. v. Shrier, 6 Ind. 141, 1855; Northern Ind. R. R. Co. v. Martin, 10 Ind. 460, 1858; Central R. R. Co. v. Davis, 19 Ga. 437, 1856; Galena and Chicago Union R. R. Co. v. Jacobs, 20 Ill. 478, 1858; Philadelphia and Reading R. R. Co. v. Hummell, 44 Penn. St. 375, 1863; East Tenn. and Georgia R. R. Co. v. St. John, 5 Sneed (Tenn.), 524, 1858; Brown v. Hannibal and St. Joseph R. R. Co., 50 Ind. 451, 1872; Macon and Western R. R. Co. v. Davis, 18 Ga. 679, 1855; Illinois Central R. R. Co. v. Hutchison, 47 Ill. 408, 1868; Daley v. Norwich and Worcester R. R. Co., 26 Conn. 591, 1868.

Gustave Cook, also for appellee.

Gould, Associate Justice.—On the 10th of April, 1873, at noon, W. J. Sympkins, lying in a state of insensibility on the road-bed of the Central Ry., at a point where there was a long curve, and about 190 steps from a public crossing, was run over by the cars, whereby he lost his right arm, and was otherwise bruised. On his behalf, it is claimed that whilst walking on the railroad track he was providentially stricken down by a fit; that at the point on the curve where he fell, the engineer, by keeping a proper look-out, could have discovered him at about 300 steps distance, in ample time to have stopped the train and avoided the accident. On the part of the railway company, it is asserted that Sympkins' fit was nothing more than one of intoxication; that at all events he was negligent originally in walking on the track, and was wrongfully there; that he was lying outside of the rails in such a way that the engineer neither could nor did discover him in time to avoid running over him, he having immediately used every means to stop the train.

In its charge the court told the jury: "If the evidence satisfy

you that the engineer could, by the use of due and proper care and attention, have discovered the plaintiff on the track in time to have stopped without running over him, then his not doing so is such negligence as will render defendant company liable to plaintiff."

The defendant asked sundry charges, embodying the proposition, that, unless the engineer actually saw Sympkins a sufficient length of time and distance to stop the train and prevent the injury, the company was not liable; and denying that, as to persons wrongfully on the track, the law imposed on the railroad any duty to keep a look-out, or any liability except for "wilful or wanton negligence on the part of its agents." The following charge was also amongst those asked for and refused:

"It is in evidence before you that the plaintiff had on the same day taken one or more drinks of liquor, and that he never before that day, nor since, has had a fit. It is your peculiar province to determine whether or not that fit was a fit of intoxication. If he was in a fit of intoxication, or drunk, at the time of the accident, and the accident was occasioned in any degree by that fit of intoxication or drunkenness, then and in that case the defendant is not liable, and the plaintiff is not entitled to recover, unless the accident happened and was occasioned by the wanton or wilful negligence of the engineer, or those in charge of the train."

The plaintiff recovered a judgment, and the questions here presented arise mainly on the charge. We do not assent to the proposition that a railroad company may not become liable to one who is run over and injured by reason of the want of watchfulness of its servants, although such person may have been originally a trespasser on the track. If a party be wrongfully on the track under such circumstances, or, being there, acts in such a way as to be himself a proximate cause of his own injury, he will be precluded from recovery on grounds of public policy, as being himself guilty of contributory negligence. Although the company's agents may have failed in proper watchfulness, the injured person is regarded as being himself too directly a cause of the injury to be allowed to complain. It is not that no wrong has been done by the company in the negligence of his agents, but that the injured party is precluded from complaining of that wrong.

A man goes upon the railroad track at a time and place when no danger is nigh, and whilst there, by some accident or providential cause, becomes insensible, and so remains perhaps for hours, until the time for a train comes round.

Although he originally goes on the track wrongfully, it is under circumstances threatening no direct injury, nor, being on the track, does he do anything "positive or negative to contribute to the immediate injury." Baltimore and Ohio R. R. Co. *v.* State, use of Trainor, 33 Md. 554. If the engineer on the approaching train keep that look-out which is required of him at all times, not only

to secure the safety of the train, but to avoid injury to any animal or person on the track, this person lying there in open view must be discovered. Not to discover him is, under the circumstances, negligence, and that negligence is the proximate cause of the injury; whilst the negligence of the party in going on the track is only a remote cause. Between that original act of negligence and the injury has intervened a new agency, a providential dispensation, breaking the causal connection. Brandon *v.* Gulf City Cotton Press, etc., 51 Tex. 121. Here there is not such contributory negligence as prevents the party from recovering for an injury caused by the negligence of the company's agent, and if a recovery be denied, it must be placed on some other principle.

Counsel for appellant cite a number of cases which deny any duty on the part of a railroad company to one wrongfully on the track, and deny any liability for injury to such person caused by anything short of wantonness. On examination, it will be found that in most of these cases the plaintiff either directly contributed to the injury or the negligence established in the defendant's servants were not the cause of the injury. Take for example two leading cases in Pennsylvania, where this doctrine has been most forcibly asserted. R. R. *v.* Norton, 24 Penn. St. 469, was a case where the plaintiff had fastened his machinery for sawing wood to the rail of the company's road, and the court holds "it evident that the imprudence of the plaintiff was the immediate cause of the injury." R. R. Co. *v.* Hummell, 44 Penn. St. 378, was a case of injury to a child, in which the only negligence charged was a failure to blow the whistle or give signals on starting. It does not appear from the evidence that this failure was the cause of the injury.

It may safely be asserted that but few cases can be found where a party, not guilty of contributory negligence, and establishing an injury which would have been prevented but for the carelessness of the company's agents, has been denied a recovery on the ground that the company owes no duty of carefulness to one wrongfully on their track.

In our opinion, there is a distinction between the duty devolving on the owners of land on which there is a dangerous excavation, and that devolving on a corporation invested by law with the extraordinary power of traversing the country with huge cars, whose progress everywhere is necessarily attended with danger. They who place such dangerous machines in motion, should, we think, be required to take precautions against their injuring any who may happen to be in their pathway. "The care in conducting any business should be proportionate to its dangerous motion." Gorman *v.* Pac. R. R. Co., 26 Mo. 448. The extent of the precautions required of a railroad company depends on all the circumstances. The regulations of railroads exact watchfulness of the engineers,

and this rule should operate for the benefit of the public as well as the company.

Authorities are not lacking in support of the position that a "reasonable look-out," varying according to the danger, and all the surrounding circumstances is a duty always devolving on those in charge of a railroad train in motion. Baltimore and Ohio Ry. Co. v. State of Maryland, for use of Hannah Dougherty, 36 Md. 366; Baltimore and Ohio Ry. Co. v. State, use of Trainor, 33 Md. 554; Harlan v. St. Louis, Kansas City and N. Ry. Co., 2 Thompson on Negligence, p. 439 (64 Mo. 480, and 65 Mo. 22), citing Hicks v. Pacific R. R. Co., 64 Mo. 430. The duty of watchfulness has often been enforced against railroads in cases of injuries to cattle trespassing on their track, and that, too, in the absence of any statutory provision or in cases outside of the statute. Isbell v. N. Y. and N. H. R. R. Co., 27 Conn. 393; Gorman v. Pac. R. R. Co., 26 Mo. 442; Chicago and Ill. R. R. v. Barrie, 55 Ill. 226; Kerwhacker v. C. C. and C. R. R. Co., 3 Ohio St. 172. We prefer that line of decisions holding railroads bound to exercise their dangerous business with due care to avoid injury to others, as correct in principle and sound in policy, and as protecting even a trespasser who is not guilty of contributory negligence. We are inclined, however, to the opinion that the charge given by the court in this case may have led the jury to believe that they could only find for defendants should they think that the engineer "could not and did not discover plaintiff on the track in time to stop, without running over him." Read as a whole, especially in connection with its final clause, the charge is not erroneous, and may not perhaps have been misunderstood. We call attention to it because of our opinion that the watchfulness required depends on all the circumstances, having reference to all the duties of the engineer, and that it is for the jury to say whether, under the circumstances, he not only could, but should have discovered the plaintiff in time to have stopped the train. In other words, that the engineer, had he been exercising that ordinary and proper care which under the circumstances was his duty, would have discovered the plaintiff in time.

But we are of opinion that the court, its attention being called to the subject by a charge asked by defendant, should have given the jury an instruction as to their duty in the event they found that the plaintiff was intoxicated when the accident occurred. Whether he was so intoxicated or not, was under all the evidence an issue of fact for the jury. If they found, as claimed by defendant, that his fit was one of intoxication, the authorities seem to be that "such conduct is contributory negligence which constitutes a bar to his action for damages." 1 Thompson on Neg., p. 450, citing Ill. Cent. R. R. Co. v. Hutchinson, 47 Ill. 408; Herring v. Wilmington and Raleigh R. R. Co., 10 Iredell, 402; H. and T. C. R. R. Co.

v. Smith, 52 Tex. 178. In such case the injured party would be precluded from recovering for anything short of wanton or wilful neglect.

Because of this error the judgment is reversed and the cause remanded.

Reversed and remanded.

The five cases above reported all turn upon the obligation of railroad companies to persons trespassing on the line of their tracks. A great number of decisions have been rendered on this point by the various courts of this country, and the conclusions reached are by no means harmonious. An attempt will, however, be made to state briefly the leading principles which have been enunciated on this topic.

It is well settled that foot passengers have no right to walk upon the tracks of railway companies. If they do so, except at crossings, they become trespassers, and accordingly, in most cases, will be precluded from recovering against the companies for injuries inflicted upon them by passing trains, notwithstanding the negligence of the companies' employees. R. R. Co. v. Norton, 24 Pa. St. 465; Galena, etc., R. R. Co. v. Jacobs, 20 Ill. 478; Lake Shore, etc., R. R. Co. v. Hart, 87 Ill. 529; Little Rock and Fort Smith R. R. Co. v. Pankhurst, Vol. V. page 685; Mason v. Mo. Pacific R. R. Co., supra, p. 1.

In the recent case of Mulherrin v. Delaware, Lack. and W. R. R. Co., 81 Pa. St. 366, this doctrine is thus clearly and concisely stated: "Except at crossings where the public have a right of way, a man who steps his foot upon a railroad track does so at his peril. The company have not only a right of way but such right is exclusive at all times and for all purposes. This is necessary not only for the proper protection of the company's rights, but also for the safety of the travelling public. It is not right that the lives of hundreds of persons should be placed in peril for the convenience of one single foolhardy man, who desires to walk upon the track. In England it is a penal offence for a man to be found unlawfully upon the track of a railroad (3 and 4 Vict., c. 97, § 16). It would add materially to the public safety were there a similar law here."

A trespasser, however, merely because he is a wrong-doer, does not become altogether an outlaw. The company still owe a certain measure of duty to him from which they cannot escape. Rounds v. Del., Lack. and W. R. R. Co., 64 N. Y. 129; McCarty v. Delaware and Hudson Canal Co., 17 Hun, 74; Spofford v. Harlow, 3 Allen, 176; Lovett v. Salem and S. D. R. Co., 9 Allen, 557; Penn. R. R. Co. v. Sinclair, 62 Md. 301; Gillis v. Penn. R. R. Co., 59 Pa. St. 129.

Hence, in case of gross negligence or carelessness on the part of those in charge of the train, the company will be held liable for an injury inflicted even upon a trespasser. Teunenbroock v. So. Pacific Coast R. R. Co., supra, page 8; Carroll v. Minn., etc., R. R. Co., 13 Minn. 30; Green v. Erie R. R. Co., 11 Hun, 338; Kenyon v. N. Y., etc., R. R. Co., 5 Hun, 479; Donaldson v. Milwaukee, etc., R. R. Co., 21 Minn. 293; Herring v. Wilm., etc , R. R. Co., 10 Ired. 402; Johnson v. Boston and M. Ry., 125 Mass. 75; Morrissey v. Eastern R. R. Co., 126 Mass. 377.

So, too, the company will be held liable if such killing or injury appears to be a mere wanton or malicious act, provided, of course, the employee is at the time acting within the scope of his duty. Terre Haute and Ind. R. R. Co. v. Graham, 46 Ind. 239; Illinois Cent. R. R. Co. v. Hall, 72 Ind. 222; Evansville, etc., R. R. Co. v. Wolfe, 59 Ind. 89; Kansas Pac. R. R. Co. v. Ward, 4 Col. 30; Rothe v. Milwaukee and St. P. Ry. Co., 21 Wis. 256;

Phila. and Reading R. R. Co. v. Hummell, 44 Pa. St. 375; Pitts., Ft. Wayne and Chicago R. R. Co. v. Evans, 53 Pa. St. 250; Same v. Collins, 87 Pa. St. 405.

The amount of care and caution required of the engineer of a train in looking out for trespassers varies, of course, according to the locality. It is greater in densely populated districts than in the open country. Upon this point the court says, in Hicks v. Pacific R. R. Co., 64 Mo. 430: "The care and caution required of railroad companies in running their trains are commensurate with the danger to persons and property incident to that mode of transporting freight and passengers, and at some points on the road greater care is exacted than at others. In running through towns and cities and over public crossings, they are expected to be more careful than at other places where not so likely to injure persons or property."

There are many authorities which hold railroad companies to a much stricter measure of duty with regard to trespassers than has been already laid down. These seem to indicate that ordinary care will be exacted and that in the absence of such care the company will be held liable. Needham v. St. F. and St. J. R. R. Co., 37 Cal. 409; Kansas Pac. R. R. Co. v. Cranmer, 4 Col. 524; Hicks v. Pacific R. R. Co., 64 Mo. 430; Richmond and D. R. R. Co. v. Anderson, 31 Gratt. 812; Murphy v. Chicago, R. I. and P. R. Co., 38 Iowa, 539; S. C., 45 Iowa, 661; Isbell v. N. Y. and N. H. R. R. Co., 27 Conn. 393; Patterson v. Phila., W. and B. R. R. Co., 4 Houst. 103; Evansville and C. Ry. Co. v. Hiatt, 17 Ind. 102; Illinois Central R. R. Co. v. Godfrey, 71 Ill. 500.

In the case of Harlan v. St. Louis, etc., R. R. Co., 65 Mo. 22, the liability for ordinary care is thus defined and limited: "When it is said in cases where the plaintiff has been guilty of contributory negligence, that the company is liable if by the exercise of ordinary care it could have prevented the accident, it is to be understood that it will be so liable if by the exercise of reasonable care, after discovery by the defendant of the danger in which the party stood, the accident could have been prevented; or if the company failed to discover the danger through the recklessness or carelessness of its employees, when the exercise of ordinary care would have discovered the danger and averted the calamity." And see Finlayson v. Chicago R. R. Co., 1 Dill. 579; Balt., etc., R. R. Co. v. State to use, 36 Md. 366.

It seems to be universally conceded that where the engineer of a train observes an adult trespassing upon the track, he is entitled to presume that that trespasser is in full possession of his senses, and that he will upon receiving proper warning of the approach of the train step from the track to a place of safety. Hence the engineer is not bound to stop the train but only to give such intimation of its approach by bell or whistle as is customary and proper. If he does this he has discharged his full duty. Poole v. North Car., etc., Ry. Co., 8 Jones L. 340; Harty v. Central R. R. Co., 42 N. Y. 468; O'Donnell v. Mo., etc., Ry. Co., 8 Cent. L. J. 414; Illinois, etc., R. R. Co. v. Moaglers, 85 Ill. 181; Cogswell v. Oregon, etc., R. R. Co., 6 Oreg. 417; Maher v. Atlantic, etc., R. R. Co., 64 Mo. 267; Holmes v. Central R. R. Co., 37 Ga. 593; Herring v. Wilmington, etc., R. R. Co., 10 Ired. 402; Telfer v. Northern R. R. Co., 1 Vroom (N. J.), 188; Frech v. Phila., W. and B. R. R. Co., 39 Md. 574; Chicago, B. and Q. R. R. Co. v. Lee, 68 Ill. 576; Chicago, B. and Q. R. R. Co. v. Damerell, 81 Ill. 450; Mobile and M. R. Co. v. Blakeley, 59 Ala. 471; Tanner v. Louisville and M. R. Co., 60 Ala. 621.

If, of course, the engineer should happen to know that the adult was deaf, blind, or otherwise incapable of appreciating the warning, a greater measure of duty would be required, but not otherwise. Herring v. Wilmington and Raleigh R. R. Co., 10 Ired. L. 402; Frech v. Phil., W. and B. R. R. Co., 39 Md. 574; Louisville and Nashville R. R. Co. v. Cooper's Adm'r, supra, p. .

Where the engineer perceives that the person on the track is a child, there he is bound to exercise great caution, for he cannot presume that the child will be able when the warning is given to appreciate the danger of his position and to escape from it. Penna. R. R. Co. *v.* Morgan, 82 Pa. St. 134; Kenyon *v.* N. Y., etc., R. R. Co., 5 Hun, 479; Phila., etc., R. R. Co. *v.* Spearen, 47 Pa. St. 300; McMillan *v.* Burlington, etc., R. R. Co., 46 Iowa, 231; Meyer *v.* Midland, etc., R. R. Co., 2 Neb. 319; Penna. R. R. Co. *v.* Lewis, 79 Pa. St. 33; Isabel *v.* Hannibal and St. Jo. R. R. Co., 60 Mo. 475; Bailey *v.* Chicago, etc., R. Co., 4 Biss. 430; Frick *v.* St. Louis, etc., Ry. Co., 6 Cent. L. J. 317.

The same principle applies in cases of adults who are evidently so situated as to make their escape from the impending danger difficult or impossible.

Where, therefore, an engineer observed a horseman who was riding away from the train at full speed through a deep railroad cut suddenly thrown from his horse and disabled, it was held that it was his duty not only to warn the person injured of the approach of the train, but to stop the engine as soon as possible; for the circumstances clearly forbade the possibility of the escape of the unhorsed man from his dangerous position. Tanner's Ex'r *v.* Louisville and Nashville R. R. Co., 60 Ala. 621.

The same obligation is incumbent on the engineer in those cases where he sees a heavily loaded team attempting to cross the track, unless, of course, it is clear that the team will have passed before the engine can reach the point. Chicago and A. R. Co. *v.* Hogarth, 38 Ill. 370; St. Louis, A. and T. H. R. Co. *v.* Manly, 58 Ill. 300; Card *v.* N. Y. Cent. and H. R. R. R. Co., 50 Barb. 39.

It seems that where persons are lying asleep upon a railroad track, and are run over by a passing train, their conduct is generally considered such as to preclude recovery. Richardson *v.* Wilmington and Man. R. R. Co., 8 Rich. L. 120.

Where, therefore, a slave lay down and went to sleep upon a railroad track among such high grass that the engineer failed to see him until within twenty feet of him, and he was in consequence run over and killed, it was held that his master could not maintain an action against the company. Felder *v.* Louisville, Cinn. and Charlestown R. R. Co., 2 McMull. (S. C.) 403. And the railroad company is in such case held exempt from liability even though its employees be guilty of negligence.

In Herring *v.* Wilmington and Raleigh R. R. Co., 10 Ired. 432, the facts were these: Two slaves belonging to the plaintiff fell asleep upon a railroad track. They were visible by the engineer of an approaching train for fully half a mile from the point where they were lying. Whether said engineer actually saw them or not did not appear. He, however, made no signal, nor did he endeavor to stop the train until within thirty or thirty-five yards of the prostrate figures. It was then, of course, too late to avert the accident and both slaves were killed. It was held that the engineer had a right to suppose that the slaves would, on the approach of the train, clear the track and that he had been guilty of no negligence in the premises.

To a similar effect was the case of Wilmington and Weldon R. R. Co., 74 N. C. 655. Here two children aged respectively ten and fifteen years seated themselves on a railroad track, and becoming drowsy lay down and fell asleep. The engineer of an approaching train might have seen them at a distance of 200 yards. As a matter of fact he failed to see them until within 150 feet. He then whistled loudly thinking they were hogs on the track, and finding they did not move very shortly afterwards tried to stop the train. He failed, however, to do so in time, and both children were killed. It was *held*, that under the circumstances no recovery could be had against the company.

It is presumed, however, that if the employees of a railroad should actu-

ally run over a sleeping or intoxicated person wilfully or through such gross neglect as in law would be tantamount to a wilful act, the company would be held liable. See in support of this proposition the case of I. C. R. R. Co. v. Hutchinson, Adm'x, 47 Ill. 408, where the court reversed for a failure to affirm the following point, which it pronounced to be the law. "If the jury believe from the evidence that the deceased, while intoxicated, placed himself about dark, or in the dusk of the evening, on defendant's track, running along a public street where the defendant's trains were constantly passing and repassing, and so remained there until run over by the passing engine of defendants, then deceased was guilty of such gross negligence that you should find the defendant not guilty, unless you further believe from the evidence that the agent or agents of defendant wilfully caused the death of deceased, or were guilty of such gross neglect on their part as amounts in law to a wilful neglect of duty." And see also, H. and T. C. Ry. Co. v. Sympkins, supra, p. 11, which contains substantially the same doctrine.

Where a railroad company has expressly licensed the use of its track as a highway by the public, its measure of duty as to persons walking on the track is of course enhanced. Daley v. Norwich, etc., R. Co., 25 Conn. 591; Kay v. Pennsylvania R. R. Co., 65 Pa. St. 269; Brown v. Hannibal and St. Jo. R. R. Co., 50 Mo. 461; Kansas, etc., R. Co. v. Painter, 9 Kans. 620; Harty v. Cent. R. R. Co., 42 N. Y. 468; Murphy v. Chicago, etc., R. R. Co., 45 Iowa, 661; Illinois Cent. R. R. Co. v. Hammor, 72 Ill. 347.

But the mere fact that persons in the vicinity have become accustomed to use the track in this manner does not alter the liability of the company. Illinois Cent. R. R. Co. v. Hetherington, 83 Ill. 510; Finlayson v. Chicago, etc., R. R. Co., 1 Dill. 579; Galena, etc., R. R. Co. v. Jacobs, 20 Ill. 478; Bancroft v. Boston, etc., R. R. Co., 97 Mass. 276; Huckly v. Boston and L. R. Co., 14 Allen, 429; Nicholson v. Erie R. R. Co., 41 N. Y. 526; Sutton v. N. Y. Cent. and H. R. R. Co., 66 N. Y. 243; Matze v. N. Y. Cent. and H. R. R. Co., 1 Hun, 417. But see Indianapolis and St. Louis R. R. Co. v. Galbreath, 63 Ill. 436.

PENNSYLVANIA R. R. CO.

v.

BOCK.

(98 *Pennsylvania Reports*, 427.)

In an action by a father to recover damages for the death of his son by the alleged negligence of a railroad company, the defendant requested the court to charge that the plaintiff, being about to drive a team, with two mules and a horse on the lead, across a railroad track, with a loaded wagon, where trains were running propelled by steam, having placed his son, seven years of age, on the lead horse, over which he (the father) had no control, was guilty of negligence in placing his son in such a dangerous position, and cannot recover for the loss of the life of his son or his horse killed by the passing train; which the court answered: "This point, assumes a fact, the existence or non-existence of which is a question for your determination, to wit: That the plaintiff placed his son on a horse over which he had no control. This is for you, and we cannot assume it. If it were true it would be strong evidence of negligence. It is for you to find, under all the evidence

in the case, whether there was negligence either on the part of the plaintiff or of his son, who was killed, which contributed to the production of the accident. If there was such contributing negligence, the plaintiff cannot recover." *Held*, that the assumption in the point forbade its affirmance, and that it could have been well refused without any qualifying remarks. *Held*, further, that there was error in the remark that if the assumed facts were true, it would be strong evidence of negligence, for on the verity of the facts as assumed, without reference to other proofs, the plaintiff was guilty of negligence, and as it was not certain that this error did the defendant no harm, the judgment must be reversed.

Defendant moved in arrest of judgment on the ground that there had been a misjoinder of rights of parties. The declaration discovered no inconsistency in the rights sued upon, nor any misjoinder of the claimants thereunder. *Held*, that there was nothing on the face of the record to arrest the judgment, and if there was actual misjoinder, it should have been taken advantage of on the trial.

A common-law and statutory claim for damages may be joined in the same action when they admit of the same pleas and are followed by the same judgment.

A father brought an action against a railway company for the death of his minor son by the alleged negligence of the company. In the same suit he also joined a claim for damages for a horse killed at the same time. At the trial it was agreed that the case should be tried as if the mother of the boy were a party, and that she should be concluded by the verdict. The verdict was for the plaintiff. A motion was made in arrest of judgment. *Held*, that there was nothing on the record which could be taken advantage of by this motion.

MARCH 5th, 1880. Before SHARSWOOD, C. J., GORDON, PAXSON, TRUNKEY and STERRETT, JJ. MERCUR and GREEN, JJ., absent.

Error to the Court of Common Pleas of Bucks County: Of July Term 1878, No. 67.

Case by Anthony Bock against the Pennsylvania R. R. Co. to recover damages for the death of his son and also for the loss of a horse, killed at the same time, by one of defendant's trains.

At the trial, it was agreed that the action should be tried with the same effect as if the plaintiff's wife had been a party plaintiff, and that she should be concluded by the verdict.

It appeared from the evidence that on the morning of the 31st of May, 1875, the plaintiff was hauling manure from a stable in the town of Bristol, Bucks County. His team consisted of a hay wagon, two mules and a horse on the lead. In going to the stable, he had to cross the track of the defendant's railroad, which at this point runs through a well-built up portion of the town. He had crossed the track along this road driving the two mules, and had sent his son with the horse by another road which passes under the railroad track, but which at that time was impassable for wagons. The son was a strong and very intelligent lad about seven years old, and who was accustomed to assist his father in various ways. While the plaintiff was loading the manure at the stable, the lad brought the horse up and geared him to the wagon, and when his father was ready to start, he jumped on the horse's back and the

[illegible] There was to be attached to the horse, the boy [illegible] while the father walked [illegible] and taking him by the bridle thus [illegible] of the team. There is an incline on [illegible] of the railroad track at the point of the crossing, and [illegible] about fifty feet from the track, the plaintiff [illegible] From this point the track is only visible a [illegible] a westerly direction, the view being obstructed by the [illegible] but at a point where the track the view in the same direction is unobstructed for about four hundred and [illegible] feet, and in the middle of the track the view is clear [illegible] feet. The crossing is made of planks laid down between [illegible] and making an even surface. When plaintiff stopped [illegible] he proceeded alone to the middle of the track, and [illegible] looking in both directions and listening for about a [illegible] minute, and not seeing or hearing a train, he called to the boy [illegible] and plaintiff walked back to his usual place and took [illegible] of the bridle. At the moment when the horse reached the first rail of the track, the plaintiff heard a train approaching. He shouted and jerked the mule back, but the horse [illegible] fallen on the track, and was struck by the east-bound train, [illegible] instantly killed. The boy was thrown on the truck of the [illegible] in front of the boiler, and died a few hours after the accident from his injuries. There was a conflict of evidence as to [illegible] speed of the train. One witness testified that both he and the plaintiff shouted, but that within three seconds from the time the train was in sight the accident occurred. It was alleged on the part of the plaintiff that the speed of the train was in excess of that allowed by the ordinance of the borough. The evidence as to [illegible] rate of speed varied from eight to twenty-five miles an hour. [illegible] testimony was equally conflicting as to whether the whistle [illegible] the engine was blown or its bell rung.

[illegible] the first point of the defendant's with the answer of the court, [illegible] were as follows:



"That the plaintiff being about to drive a team with two mules and a horse on the lead across a railroad track with a loaded [illegible] where trains were running propelled by steam, having placed his son, seven years of age, on the lead horse, over which [illegible] the father had no control, was guilty of negligence in placing [illegible] son in such a dangerous position, and cannot recover for the [illegible] of the life of his son or his horse, killed by the passing train.

"Ans. This point assumes a fact, the existence or non-existence of which is a guess on the part of the jury, to wit: That the plaintiff placed his son on a horse over which he had no control. This is for you and we cannot assume it. If it were true, it would be strong evidence of negligence. It is for you to find under all the evidence in the case whether there was negligence either on

the part of the plaintiff or of his son, who was killed, which contributed to the production of the accident. If there was such contributing negligence, the plaintiff cannot recover."

The verdict was in favor of plaintiff for the sum of $2176 for horse and funeral expenses included, and six cents costs.

The defendant moved, in arrest of judgment, for the following reasons: 1. The action was brought for damages to the plaintiff and wife, for the loss of their son, and the declaration joined a claim for a large sum, to wit: $500 in and about the taking care of the body of said Anthony Bock, Jr., and in and about his funeral expenses, which claims were not in the same right, and could not be joined in the same suit and averred in the same declaration. 2. The declaration in the action sets forth as the cause of action an injury causing death, the result of negligence by the defendant; that the person killed was a minor child of plaintiff, and at the commencement of the trial it was agreed, "that this action shall be tried in the same manner and with the same effect as if Linda Bock, wife of plaintiff, had been a party plaintiff thereto; and that the recovery, if any is had, shall include all her demands against the defendant, and that she shall be concluded by the verdict should it be in favor of the defendant," stating a cause of action in favor of the parents for the loss of the life of a child under the statute; and in the same declaration, a claim for taking care of the body of said child, and in and about his funeral expenses; and a separate count for the loss of a horse caused by the negligence of the defendant, which said funeral expenses and the damages for the loss of the horse, belonged to the said Anthony Bock; and the damages for the injury causing the death of the child, belonged to the husband and wife jointly, and could not be joined in the same action; and the verdict is for a gross sum for plaintiff for horse and funeral expenses included, which claims cannot be joined. 3. The declaration joins a claim for damages under the statute for an injury causing death, the damages for which belong to two persons, with a cause of action at common law, for the loss of a horse and funeral expenses of a child belonging to one person; and the verdict is for a gross sum, and is expressly found by the jury to be for "$2176, for horse and funeral expenses included," without designating the proportions for each, upon which no judgment can be entered. 4. There is a misjoinder of parties and causes of action, and a verdict for a gross sum upon which no judgment can be entered. 5. There is a judgment for a gross sum for causes of action which as stated in the declaration, belonging to different parties, without designating which part belongs to each, upon which no judgment can be entered.

The court overruled the motion in an opinion, saying:

"It is almost unnecessary to say we can arrest the judgment only for error apparent on the face of the record. Is there such error

here? The wrong complained of in the narr. is negligence resulting in, 1. The killing of the plaintiff's minor son, whereby he lost his services and was put to expense in taking care of and burying his body; 2. The killing of his horse. When the jury was about to be empanelled it was agreed by the parties 'that this action shall be tried in the same manner and with the same effect as if Linda Bock, wife of plaintiff, had been a party plaintiff thereto, and that the recovery, if any is had, shall include all her demands against the defendant, and that she shall be concluded by the verdict should it be in favor of the defendant.' We do not regard this as making the wife a party to the suit. We look upon it rather as an agreement that the entire damages should be determined and recovered in the suit by the husband, and that in consideration thereof the defendant should not thereafter be molested by any claim by or for the wife. But suppose we consider the agreement as placing her as a party plaintiff on the record? How does this render an error apparent on its face? The effect would be to join her as a plaintiff on every count and upon every statement of ownership or claim. Instead of a separate cause of action in the husband for separate injuries to him, we should have a statement or a joint cause of action for injury to joint property in the horse, joint expenses in the burial of the son, and joint loss by reason of his death. The declaration would still be a consistent whole. There would be nothing there to show the several items if the demand were in different rights. The error, if any, in this respect, would be on the trial and not on the face of the record. We see no reason why the common-law claim for the loss of the horse, and the statutory claim for the loss of the son, may not be joined in the same declaration. They are of the same nature, admit of the same pleas, and are followed by the same judgment. 1 Ch. Pl. 197; Martin *v.* Stille, 3 Whart. 337. These views apply to all the reasons in support of the motion for arrest of judgment.

Judgment was then entered on the verdict, when defendant took this writ, and alleged that the court erred, inter alia, in the answer to defendant's fifth point, in overruling the motion in arrest of judgment, and in entering judgment on the verdict,

G. & H. Lear, for plaintiff in error.—When a child is placed in danger by the positive act of its guardian, it is contributory negligence. Kay *v.* Pennsylvania R. R. Co., 15 P. F. Smith, 269. If parents permit a child of tender years to wander on a street, it is negligence. Phila. and Reading R. R. Co. *v.* Long and wife, 25 P. F. Smith, 257. It is the duty of the parent at all times to shield his child from danger, and this duty is the greater when the risk is imminent; the degree of protection is in proportion to the helplessness and indiscretion of the child. Glassy *v.* Hestonville, Mantua and Fairmount Passenger Ry. Co., 7 P. F. Smith, 172. See

Smith *v.* O'Conner, 12 Wright, 218; P. A. and M. Ry. Co. *v.* Pearson and wife, 22 P. F. Smith, 169. See also the recent case of Smith *v.* The Hestonville Ry. Co., 11 Norris, 450.

The action for death by negligence is statutory, while that for the loss of the horse is a common law remedy, and the two cannot be joined. Pennsylvania R. R. Co. *v.* Zebe, 9 Casey, 328; North Pennsylvania R. R. Co. *v.* Robinson, 8 Wright, 178; 1 Chitty, sec. 200. The wife had no cause of action for the horse, and there was therefore a misjoinder of her and her husband's right, with his alone. 1 Chitty, 205, sec. 75.

B. F. Gilkeson, George Ross and L. L. James, for defendant in error.—Observation of the practice of teamsters, having a team of four or three horses, will demonstrate that the position of the driver is upon the back, or at the bridle of the near-side tongue horse. Whether the position of the father gave him the opportunities of control which it is claimed it did, was a question of fact for the jury, and for them alone; as such, it was submitted, and their verdict determines that they—whether from their own experience as farmers or otherwise—found the fact to be true. Whether the situation of the boy upon the horse contributed to the accident is a question for the jury. Catawissa R. R. Co. *v.* Armstrong, 2 P. F. Smith, 282. The question of contributory negligence is to be determined by a reference to the age, intelligence and physical strength of the person injured, and the circumstances under which the injury was sustained. Oakland R. R. Co. *v.* Fielding, 12 Wright, 320; Philadelphia Passenger R. R. Co. *v.* Hassard, 25 P. F. Smith, 367.

The defendant having taken his chances before a jury, without objection, should not now be permitted to unravel the whole case upon a question such as here raised. Upon the trial, the plaintiff below could have entered a non. pros. as to the counts for the horse and funeral expenses; and what might have been permitted below, in the nature of an amendment, is not ground for reversal after a trial on the merits. Shoenberger *v.* Zook, 10 Casey, 24; Roop *v.* Roop, 11 Id. 59; Loew *v.* Stocker, 11 P. F. Smith, 347; Kelsey *v.* Bank of Crawford County, 19 Id. 426.

Mr. Justice TRUNKEY delivered the opinion of the court March 29th, 1880.

The defendant's fifth point was, "that the plaintiff being about to drive a team, with two mules and a horse on the lead, across a railroad track with a loaded wagon, where trains were running propelled by steam, having placed his son, seven years of age, on the lead horse over which he, the father, had no control, was guilty of negligence in placing his son in such a dangerous position, and cannot recover for the loss of his son or the horse killed by the passing train." Ans.: This point assumes a fact, the existence or non-existence of which is a question for your consideration, to wit,

whether the plaintiff placed his son on a horse over which he had no control. This is for you, and we cannot assume it. If it were true it would be strong evidence of negligence. It is for you to find under all the evidence in the cause whether there was negligence of the plaintiff or his son who was killed, which contributed to the production of the accident. If there was such contributing negligence, the plaintiff cannot recover."

The point must be considered with reference to the facts which the testimony would have warranted the jury in finding. From that they could have found that the train was running through the borough at the rate of twenty miles an hour, and no bell was rung nor whistle blown till after the accident; that the deceased was a remarkably stout and intelligent boy for his age, and was in the habit of working with his father; that he had often ridden the lead horse in the team, had, on the day he was killed, taken the horse by a way under the railroad to the place of loading, and geared him to the wagon while his father put on the load; that he got on the horse, and the team was driven near to the railroad and stopped; that the plaintiff went upon the track, looked both ways, listened, and neither seeing nor hearing an approaching train, started back, telling the boy to come ahead; that the team was started before the plaintiff reached it, he took the mule by the head, the horse got his forefeet on the track, and was struck within three seconds from the time a witness, who was standing by, saw the cars; that as soon as said witness heard the train he hallooed, the plaintiff hallooed, but the train was too fast—not a witness saw anything that could have been done to save the horse or boy, between the time of hearing the train and the accident. It cannot be pretended that any evidence shows the horse could have been got out of the way had a man sat in the place of the boy, or if the plaintiff had had a line on the horse.

The assumption in the point forbade its affirmance. It was earnestly argued that the testimony authorized the court to assume the fact. Perhaps, in all the farming and mining portions of the State, there is not a judge or juror who would say a man could have no control of the lead horse unless he has a line on him. Be this as it may, it is not a question of law for the court to say. Where there is no line there is no control. The point could have been well refused without qualifying remark, and had it been there would have been no cause for complaint. Its assumed facts are but a fraction of the story, and the part omitted shows the plaintiff's care before his attempt to cross the track, and that he was caught too suddenly for escape. In the light of the evidence, the court could not say the plaintiff was negligent, unless it is negligence in itself for a teamster to cross a railway track with his little son riding the lead horse—a proposition which has not been advanced. Excepting one remark, the instructions to the jury were

accurate, adequate and applicable to the proofs, enabling them to intelligently dispose of the questions submitted. That remark was in the answer to the fifth point, the court saying, if the assumed facts were true it would be strong evidence of negligence. As an abstraction, we think that was error; for, on the verity of the facts as assumed, without reference to the other proofs, the plaintiff was guilty of negligence. Had the point been differently framed, submitting its isolated facts to the jury, it should have been affirmed; but the court would have reminded them, as it did, that they were to consider all the facts established by the testimony.

Unless it be certain that the error did the defendant no harm, the judgment must be reversed and the cause sent back for another trial. This is doubtful. The jury judge of the credibility of witnesses, and possibly they may have found the facts as contended for by the defendant; and, if so, the error was hurtful.

The opinion of the learned judge of the Common Pleas, on the motion in arrest judgment, comprises all that need be said respecting the fourth and fifth assignments.

Judgment reversed, and venire facias de novo awarded.

PURL

v.

THE ST. LOUIS, KANSAS CITY AND NORTHERN RY. CO., Appellant.

(73 *Missouri Reports*, 168. *October Term*, 1880.)

The plaintiff, a deaf man, being about to cross a railroad track in a buggy, saw the smoke of what he took to be a moving train east of him. He crossed, drove eastward a distance of 250 feet along a road which ran parallel with the railroad and within a few feet of it, turned and drove back the same way he had come, attempting to recross the track at the same place. He never looked to the east to ascertain the direction in which the train was moving, but assumed that it was moving away from him. The view to the east was unobstructed for more than half a mile. When in the act of recrossing the track, he was looking back over his shoulder to the southward. In this position he was struck and injured by the train coming from the east. *Held*, that the accident was the result of his own negligence, and the railroad company was, therefore, not liable. *Held*, also, that his deafness was no excuse. It should rather have added a spur to his vigilance, and prompted him to employ his other faculties so as to compensate, as far as possible, for the lacking one. *Held*, also, that although plaintiff was in full view of those operating the train for a long distance, yet they were not chargeable with negligence owing to the fact that the road forked just at the crossing, and they could not anticipate that plaintiff intended to take that branch which crossed the track. *Held*, also, that under the circumstances it was immaterial whether the proper signals for the crossing were given or not.

APPEAL from Montgomery Circuit Court.—Hon. G. PORTER, Judge.

Reversed.

Wells H. Blodgett and Prosser Ray, for appellant.

H. W. Johnson and E. M. Hughes, for respondent.

SHERWOOD, C. J.—Action for damages for injury done plaintiff and his property while crossing defendant's railroad. In the view we take of this case, it is unnecessary to do more than to determine the point of the sufficiency of the plaintiff's evidence to authorize a recovery; in other words, whether, if the facts thereby established are taken as admitted, and they are to be so taken in consequence of the demurrer thereto, the plaintiff has made out a prima facie cause of action against the defendant. The evidence thus for examination establishes, as we think, and establishes very clearly, that plaintiff has shown no such cause of action. That evidence discloses the customary diversity of opinion as to whether the usual signals were given by the approaching train; some of plaintiff's witnesses testifying to having heard the whistle, and others that they did not. Whether the signals were given or not, we regard as unimportant in the circumstances of this case. The morning of the accident Purl started in his buggy from the north side of the railroad track to take a kettle to Camp's hotel, which was on the south side of and near that track, and distant from the crossing about 250 feet. Before crossing the track, and when near the lumber yard, and going toward the hotel, he saw smoke to the east, seemingly a good way off, which looked like the smoke of a train made by an engine in motion. He proceeded, passed over the crossing, then turned east, following the road which ran parallel with, in full view of and but a few feet from, the railroad track, until he reached the hotel, where delivering the kettle, he turned around immediately and drove west on the same road on his way home. When proceeding to Camp's hotel, he says that as he was facing east, that of course if there had been a train in sight he would have seen it, but he does not state that he looked. Nor did he pay any further attention to the smoke, which he took to be that of a moving train, although the testimony shows that when in front of Camp's hotel he would have had an unobstructed view of the railroad track to the east of the hotel for nearly one fourth of a mile. Nor after starting west to recross the railroad track did he look back east, because he says he "thought the train, the smoke of which I saw when I went over, was going east, and if there was any danger at all, it would come from the west." Nor when he reached the crossing where he was injured, did he look to the east, though an unobstructed view of the track in that direction could have been had for nearly half a mile, for the reason that he still clung to the assumption that danger was to be apprehended from the west, and not from the east. And the testimony also

shows that at the very time he attempted to cross the track, the train was just passing the depot 250 feet east of the crossing, but he neither looked in that direction nor stopped; on the contrary, when he made the turn to make the crossing, one of his witnesses testifies that he was "looking back over his left shoulder;" going north and looking south. "The last time I saw him he was looking back and his horse was on the track." More than that, several of Purl's witnesses, who were in excellent situations to view the whole occurrence, state that when they saw the train approaching, and saw him driving along parallel with the track, they became apprehensive that he would be struck if he attempted to cross, and so watched him until that event happened.

We see nothing in the foregoing testimony to distinguish this case in principle from others heretofore decided by us or to relieve the plaintiff from the consequences of his own folly. Fletcher *v.* A. and P. R. R. Co., 64 Mo. 484; Harlan *v.* St. L., K. C. and N. Ry. Co., 64 Mo. 480; Henze *v.* St. L., K. C. and N. Ry. Co., 71 Mo. 636; Moody *v.* P. R. R. Co., 68 Mo. 472. This case, indeed, exhibits features of recklessness that to some extent are wanting in the cases just cited; for in all those instances the parties injured at least had their faces turned toward the track they were about to cross. The very fact that Purl saw indications of a train moving upon the track, though such train seemed distant, ought of itself to have sounded an alarm in the ear of his caution and kept his faculties on the alert. Instead of that, however, the mute warning of the smoke of a moving train seems to have silenced the promptings of prudence and led him to disregard its most obvious dictates. If, therefore, he has suffered an injury in either person or property, he must be content to abide the result of his own rashness, a result which could have been averted on his part by the exercise of the very minimum of care.

And the case is not altered, nor does it become more favorable for the plaintiff by reason of his deafness. Such an affliction, so far from excusing one who might have seen the train, should rather add a spur to his vigilance and prompt him to employ his other faculties so as to compensate, as far as possible, for the lacking one. 1 Thompson on Neg., 430, and cases cited; Shearman and Redfield on Neg., § 488.

If it be said that the road on which plaintiff was driving was parallel with and in full view of the railroad track, that, therefore, defendant's servants were lacking in the proper care, or else the accident would not have occurred, the reply is an obvious one, that where the road on which plaintiff was driving makes an abrupt curve to the north to cross the railroad track, it is only some ten or twelve feet from that track; and at that point it also continues west for a short distance and then turns in a southerly course, so that defendant's servants had no cause to suspect, nor were they

ally run over a sleeping or intoxicated person wilfully or through such gross neglect as in law would be tantamount to a wilful act, the company would be held liable. See in support of this proposition the case of I. C. R. R. Co. v. Hutchinson, Adm'x, 47 Ill. 408, where the court reversed for a failure to affirm the following point, which it pronounced to be the law. "If the jury believe from the evidence that the deceased, while intoxicated, placed himself about dark, or in the dusk of the evening, on defendant's track, running along a public street where the defendant's trains were constantly passing and repassing, and so remained there until run over by the passing engine of defendants, then deceased was guilty of such gross negligence that you should find the defendant not guilty, unless you further believe from the evidence that the agent or agents of defendant wilfully caused the death of deceased, or were guilty of such gross neglect on their part as amounts in law to a wilful neglect of duty." And see also, H. and T. C. Ry. Co. v. Sympkins, supra, p. 11, which contains substantially the same doctrine.

Where a railroad company has expressly licensed the use of its track as a highway by the public, its measure of duty as to persons walking on the track is of course enhanced. Daley v. Norwich, etc., R. Co., 25 Conn. 691; Kay v. Pennsylvania R. R. Co., 65 Pa. St. 269; Brown v. Hannibal and St. Jo. R. R. Co., 50 Mo. 461; Kansas, etc., R. Co. v. Painter, 9 Kans. 620; Harty v. Cent. R. R. Co., 42 N. Y. 468; Murphy v. Chicago, etc., R. R. Co., 45 Iowa, 661; Illinois Cent. R. R. Co. v. Hammor, 72 Ill. 347.

But the mere fact that persons in the vicinity have become accustomed to use the track in this manner does not alter the liability of the company. Illinois Cent. R. R. Co. v. Hetherington, 83 Ill. 510; Finlayson v. Chicago, etc., R. R. Co., 1 Dill. 579; Galena, etc., R. R. Co. v. Jacobs, 20 Ill. 478; Bancroft v. Boston, etc., R. R. Co., 97 Mass. 276; Huckly v. Boston and L. R. Co., 14 Allen, 429; Nicholson v. Erie R. R. Co., 41 N. Y. 526; Sutton v. N. Y. Cent. and H. R. R. Co., 66 N. Y. 243; Matze v. N. Y. Cent. and H. R. R. Co., 1 Hun, 417. But see Indianapolis and St. Louis R. R. Co. v. Galbreath, 63 Ill. 486.

PENNSYLVANIA R. R. Co.

v.

BOCK.

(93 *Pennsylvania Reports*, 427.)

In an action by a father to recover damages for the death of his son by the alleged negligence of a railroad company, the defendant requested the court to charge that the plaintiff, being about to drive a team, with two mules and a horse on the lead, across a railroad track, with a loaded wagon, where trains were running propelled by steam, having placed his son, seven years of age, on the lead horse, over which he (the father) had no control, was guilty of negligence in placing his son in such a dangerous position, and cannot recover for the loss of the life of his son or his horse killed by the passing train; which the court answered: "This point, assumes a fact, the existence or non-existence of which is a question for your determination, to wit: That the plaintiff placed his son on a horse over which he had no control. This is for you, and we cannot assume it. If it were true it would be strong evidence of negligence. It is for you to find, under all the evidence

in the case, whether there was negligence either on the part of the plaintiff or of his son, who was killed, which contributed to the production of the accident. If there was such contributing negligence, the plaintiff cannot recover." *Held*, that the assumption in the point forbade its affirmance, and that it could have been well refused without any qualifying remarks. *Held*, further, that there was error in the remark that if the assumed facts were true, it would be strong evidence of negligence, for on the verity of the facts as assumed, without reference to other proofs, the plaintiff was guilty of negligence, and as it was not certain that this error did the defendant no harm, the judgment must be reversed.

Defendant moved in arrest of judgment on the ground that there had been a misjoinder of rights of parties. The declaration discovered no inconsistency in the rights sued upon, nor any misjoinder of the claimants thereunder. *Held*, that there was nothing on the face of the record to arrest the judgment, and if there was actual misjoinder, it should have been taken advantage of on the trial.

A common-law and statutory claim for damages may be joined in the same action when they admit of the same pleas and are followed by the same judgment.

A father brought an action against a railway company for the death of his minor son by the alleged negligence of the company. In the same suit he also joined a claim for damages for a horse killed at the same time. At the trial it was agreed that the case should be tried as if the mother of the boy were a party, and that she should be concluded by the verdict. The verdict was for the plaintiff. A motion was made in arrest of judgment. *Held*, that there was nothing on the record which could be taken advantage of by this motion.

MARCH 5th, 1880. Before SHARSWOOD, C. J., GORDON, PAXSON, TRUNKEY and STERRETT, JJ. MERCUR and GREEN, JJ., absent.

Error to the Court of Common Pleas of Bucks County: Of July Term 1878, No. 67.

Case by Anthony Bock against the Pennsylvania R. R. Co. to recover damages for the death of his son and also for the loss of a horse, killed at the same time, by one of defendant's trains.

At the trial, it was agreed that the action should be tried with the same effect as if the plaintiff's wife had been a party plaintiff, and that she should be concluded by the verdict.

It appeared from the evidence that on the morning of the 31st of May, 1875, the plaintiff was hauling manure from a stable in the town of Bristol, Bucks County. His team consisted of a hay wagon, two mules and a horse on the lead. In going to the stable, he had to cross the track of the defendant's railroad, which at this point runs through a well-built up portion of the town. He had crossed the track along this road driving the two mules, and had sent his son with the horse by another road which passes under the railroad track, but which at that time was impassable for wagons. The son was a strong and very intelligent lad about seven years old, and who was accustomed to assist his father in various ways. While the plaintiff was loading the manure at the stable, the lad brought the horse up and geared him to the wagon, and when his father was ready to start, he jumped on the horse's back and the

6. Where the negligence of the plaintiff and defendant is equal, or where the defendant's negligence merely preponderates, no recovery can be had. Aurora Branch R. R. Co. *v.* Grimes, 13 Ill. 585; Chicago, Burlington and Quincy R. R. Co. *v.* Lee, Admx., 68 id. 576; Rockford, Rock Island and St. Louis R. R. Co. *v.* Irish, 72 id. 404; Illinois Central R. R. Co. *v.* Goddard, Admx., 72 id. 567.

7. This court has uniformly held, that a person who knowingly goes upon a railroad track, regardless of the approach of trains thereon, is, as a matter of law, guilty of gross negligence. Chicago and North-western Ry. Co. *v.* Sweeney, 52 Ill. 325; Chicago, Burlington and Quincy R. R. Co. *v.* Van Patten, 64 id. 510; Chicago, Burlington and Quincy R. R. Co. *v.* Lee, Admr., 68 id. 576; Chicago, Rock Island and Pacific R. R. Co. *v.* Bell, Admx., 70 id. 102; Chicago, Rock Island and Pacific R. R. Co. *v.* Godfrey, 71 id. 500; Illinois Central R. R. Co. *v.* Goddard, Admx., 72 id. 567; Chicago and North-western Ry. Co. *v.* Donohue, 75 id. 106; Chicago, Burlington and Quincy R. R. Co. *v.* Harwood, 80 id. 88.

8. There are no degrees of gross negligence, therefore a plaintiff who is guilty of gross negligence contributing to the injury, cannot recover, unless the defendant has wantonly or wilfully inflicted such injury. Chicago, Burlington and Quincy R. R. Co. *v.* Van Patten, 64 Ill. 510; Same *v.* Lee, 68 id. 576; Illinois Central R. R. Co. *v.* Godfrey, 71 id. 500; Litchfield Coal Co. *v.* Taylor, 81 id. 590; Shearman and Redfield on Negligence, sec. 36.

9. The approach of the train being visible, and proper warning signals having been given, the engineer had the right to suppose that those persons whom he saw standing alongside of the track would not go on the track, so as to get hurt. Chicago, Rock Island and Pacific R. R. Co. *v.* Austin, 69 Ill. 426.

Messrs. Monroe & Leddy for the appellee:

1. It was not error to refuse the motion for a continuance. The trial was not until seven days after the withdrawal of counsel and the retainer of others, which afforded ample time to prepare for trial.

2. Appellee's duty required him to look for a safe footing, and the train he was about to get aboard. He had the right under the law, to expect both that he would be warned of the approach of the train, and that it would be run at the rate of speed required by law. St. Louis, Vandalia and Terre Haute R. R. Co. *v.* Dunn, 78 Ill. 197.

3. The language used in the second instruction is too potential —requires too much and more than the law requires of the plaintiff. The words used are, if the plaintiff "could have looked for and seen the approach of the locomotive," etc. It should have stated, if, by observing due and reasonable care, he could have

looked for the locomotive, etc. Even if the plaintiff "could have looked," and even though his failure to look might be called slight negligence, but which, under the evidence, we insist could not be called negligence, there could still be a recovery if the appellant was reckless, or its negligence gross as compared with that of appellee; but the jury are told to find for the defendant if plaintiff "could have looked."

SHELDON, J.—This was an action by Rudel, against the Pennsylvania Company, to recover for a personal injury sustained from the alleged negligent running of a passenger train on defendant's railroad. There was a recovery by the plaintiff, which, on appeal, was affirmed by the Appellate Court for the First District, and defendant has appealed further to this court.

The evidence goes to show that at the intersection of Forty-third Street and defendant's railroad, in the town of Lake, Cook County, Illinois, the defendant had a small depot or waiting-room for passengers desiring to take passage on its trains at that point. To the west of, and within three feet of the entrance door of such waiting-room is a main side-track, and within less than eight feet west from said main side-track is a main track known as the east main track, upon which defendant moves its trains going in a north direction, and within less than eight feet west of such east main track is a main track known as the west main track, upon which defendant moves its trains going in a south direction. Forty-third Street runs east and west. On a cold and dark night in February, 1880, plaintiff and five or six other persons were inside the depot waiting for the arrival from the north of what is called the dummy train of cars, upon which they were intending to take passage south for Englewood. After waiting a few minutes the dummy train came up to the station, stopping there across Forty-third Street. About that instant of time the agent of defendant in charge of the depot, and being also the flagman there, called out that the dummy had come, or was coming, and hurried the passengers out to take the train. They immediately started on Forty-third Street to get aboard the train, and the plaintiff being the first, going ahead of the others, was almost immediately struck by the express passenger train going north at a speed of from thirty to forty miles an hour, causing the injuries complained of.

On September 16, defendant's former attorneys withdrew from the cause, and on the same day other counsel was retained, and a motion, for that reason, was made for the continuance of the cause to the next term, to allow time for preparation for trial. The overruling by the court of this motion is assigned for error. The cause did not come on for trial until September 23. We see no abuse in the exercise of the discretion of the court in denying the motion which calls for our interference.

To three of the jurors there was put by defendant's counsel this question: "State briefly your idea of the duties of a juror." The court sustained an objection to the question, and this is assigned for error. As the statute names that persons selected by the county board to serve as jurors shall be "of sound judgment and well informed," it is urged that the question was proper to test the soundness of judgment and extent of information of the jurors. The unnecessary protraction of jury trials has come to be a great evil, and one thing which contributes thereto is the needlessly long drawn out examination of jurors. The question was not proper with the view stated, nor for any purpose, and a court would fail of its duty in the proper dispatch of business, to sit by and permit the consumption of its time by the putting of any such questions to jurors.

It is complained that the court erred in the admission and rejection of testimony. Space would not allow the notice in detail of the very many objections under this head. While in two or three instances there might, in strictness, be error in the ruling, it is of so unimportant a character that we may say that in this respect of the admission and rejection of evidence we find no material error which should cause a reversal of the judgment. The admitted testimony excepted to seems to have been hardly more than a description of the location and place, and what happened on the occasion and at the time of the accident. The testimony in respect to the flagman is claimed to have been inadmissible under the declaration, as it only alleged in regard to him that defendant "failed to station, keep and maintain a flagman at said Forty-third Street crossing, for the purpose of signaling persons travelling in the direction of said crossing, and warn them of the approach of any locomotive engine or other impending danger, contrary to the ordinance of the said town of Lake." It is claimed that this allegation did not admit of proof of what the flagman did and said on the occasion, as it would be showing misconduct of the flagman, which the declaration does not allege. We think the testimony as to the conduct of the flagman was pertinent, as proof of the allegation of the declaration that the company failed to keep a flagman at the spot to signal and warn of the approach of impending danger—that the allegation means more than merely that there was no flagman employed there.

It is complained that the court erred in instructing the jury, and in refusing to give instructions asked by the defendant. The court gave some of the instructions asked by the defendant, and in place of others asked by defendant, and of all asked by plaintiff, gave, of its own motion, an instruction to the jury. We think this instruction very fully and fairly gave the law of the case to the jury, leaving to the defendant no cause of complaint in that respect.

One of the refused instructions asked by defendant was, that if

plaintiff knew of the existence of defendant's east main track at the place of the injury, and that locomotives and trains frequently passed along the same going north, and that plaintiff, before he went upon said track, could have looked for and seen, or have listened for and heard, the approaching train by which he was injured, and that he did not thus look or listen, and that by reason thereof he failed to avoid the injury, then the jury should find for the defendant. It is insisted this instruction should have been given in accordance with former decisions of this court upon the subject. Ordinarily such an instruction should be given, according to what this court has often laid down to be the rule in this respect; but under the special facts and circumstances of this case, we cannot say that it was error to refuse the instruction. There was much in the peculiar circumstances of the case to go in excuse of the taking of such usually necessary precautions as are named in the instruction, before going upon a railroad track.

It is further insisted the damages are excessive. We do not see sufficient cause for the disturbance of the verdict of the jury for this reason.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

DICKEY, J.—I concur in the decisions herein contained, but do not concur in all the reasons assigned in their support. As to the question of excessive damages, I regard that a question of fact which we cannot lawfully determine, nor do I understand that it is intended here to pass upon that question, and so I object to the comment on that subject as liable to be taken as an intimation that we may have the lawful power to review the ruling on this question.

COSGROVE, Admr'x, Appellant,

v.

THE N. Y. C. AND H. R. R. R. Co., Respondent.

(*Advance Cases, New York. Nov.* 22, 1881.)

Plaintiff's intestate was riding with one B., when upon approaching defendant's track the horse became unmanageable, and dashed upon the track in front of an approaching train, and both B. and intestate were killed. The track near the crossing runs through a deep cut, and the evidence was conflicting as to whether the bell was rung or whistle blown. It appeared that intestate jumped from the wagon just as he was struck by the locomotive. *Held*, that it was for the jury to determine from the evidence whether defendant was negligent in remaining in the wagon, and it was therefore error to non-suit; that if defendant heard the noise of the locomotive or was in

any way apprised of its approach in time to have enabled him to avoid the danger by the exercise of reasonable prudence, and he chose to trust in the ability of the driver to manage the horse and avoid collision, defendant is not liable, notwithstanding the omission to ring the bell or blow the whistle; but if deceased did not hear the train or know of its approach, the mere fact that the horse on seeing the engine started forward, and getting beyond control drew the wagon on the track, would not exempt defendant from liability.

Homer A. Nelson, for appellant.

Samuel Hand, for respondent.

ANDREWS, J.—The negligence imputed to the defendant was the omission to ring the bell or sound the whistle, as required by statute. (Laws of 1854, Chap. 282, § 7.) The evidence on this point was conflicting, and presented a question for the jury. The non-suit is sought to be sustained on the ground that the accident was caused by the horse becoming unmanageable, and getting beyond control of the driver, and rushing in front of the engine, and that the omission of the statutory signals did not cause or contribute to the casualty.

The railroad, at the point of the accident, runs north and south, through a cut with walls on the sides, terminating a short distance south of the crossing in question. An east and west highway crosses the railroad about 268 feet south of the place of the accident, on a bridge, nineteen feet above the railroad, and from this highway, a short distance east of the bridge, branches the highway on which the deceased and Barringer were travelling when the accident happened. This highway, from its junction with the east and west road, descends about one foot in ten until it reaches the level of the railroad, which it crosses at grade. The walls on the sides of the cut diminish in height northerly of the bridge until they run out near the crossing.

The plaintiff's intestate shortly before the accident was invited by Barringer to ride, and they started, with a horse and wagon owned by Barringer, from a point on the east and west highway west of the railroad, and crossing the bridge turned into the highway before spoken of. Two witnesses saw the collision from a point west of this highway crossing, which commanded a view of the crossing and of the highway to its junction with the east and west road. They first observed the wagon descending the hill towards the crossing. Barringer was striving to hold the horse, which apparently was pulling hard. He succeeded in checking him. The horse started a second time, and was again checked about opposite the end of the stone wall, thirty-two feet from the crossing; and at that moment (as may be inferred) seeing the approaching engine, suddenly plunged ahead, and brought the wagon directly in front of it, and both the plaintiff's intestate and Barringer were killed.

The engineer testifies that he first saw the horse and wagon just as the horse was stepping upon the track; that the driver was holding him back, and the horse's mouth was wide open. At the same moment he saw the plaintiff's intestate with one hand on the dashboard of the wagon and one on the seat, and with his feet over the side, as if about to jump, and he sprang just as the locomotive reached him. The inference from the testimony of the two witnesses who observed the wagon as it came down the hill, is that the plaintiff's intestate did not exhibit any intention of leaving the wagon until the horse was about making his last plunge.

There can be no controversy as to the proposition that to entitle the plaintiff to recover it must appear, or there must be evidence from which a jury could infer, that the intestate's death was caused by the neglect of the defendant to ring the bell or blow the whistle; or that such negligence, without any concurrent negligence of the intestate, contributed to cause his death. If the accident resulted from a distinct and independent cause, with which the neglect of the statutory duty had no connection, plainly there can be no recovery; and it is equally clear that if the deceased heard the noise of the locomotive, or was any way apprised of its approach in time to have enabled him, by the exercise of reasonable prudence, to have avoided the danger, and he chose to trust to the ability of the driver to manage the horse and avoid a collision, the defendant is not responsible for the casualty, notwithstanding its omission to ring the bell or sound the whistle. But, on the other hand, if he did not hear the locomotive, or know of its approach, the mere fact that the horse, on seeing the engine, suddenly started forward, and getting beyond control drew the wagon on to the track in front of it, would not exempt the defendant from responsibility.

If the horse had not started, doubtless no injury would have occurred. But horses are liable to be frightened by the passing of trains, and if a traveller driving upon a highway is himself free from fault, a railroad company guilty of negligence in not giving the signals cannot escape responsibility because the horse, frightened by the sudden approach of the engine, blindly rushes before it and exposes the travellers to injury.

In the case supposed the neglect to give the signals is the legal cause of the accident, and not the conduct of the brute. The cause of the restiveness of the horse when coming down the hill is not shown. It may be conjectured that he heard the noise of the locomotive. But it certainly is not a legal inference that the deceased or the driver heard it because the horse did. If the deceased heard it before reaching the end of the wall, he may have been negligent in remaining in the wagon. But it was for the jury to draw the inference from the evidence.

When did the deceased first discover the danger, and did he do

or omit to do anything after he knew that the engine was approaching which reasonable prudence required, and did the omission to give the statutory signals subject him to the peril which otherwise he would have avoided? We think these questions should have been referred to the jury, and that the non-suit was improperly granted. This leads to a reversal of the judgment and a new trial.

All concur except RAPALLO, J., absent.

See note, p. 49.

TURNER

v.

THE HANNIBAL AND ST. JOSEPH R. R. Co., Appellant.

(74 *Missouri Reports*, 603.)

A railroad company, whose property is temporarily in the hands of a receiver, will not be held liable for injuries caused by the negligent management of a locomotive by a person in the service of the receiver.

Upon the trial of an action against a railroad company for a negligent collision with and injury to plaintiff's wagon and horses at the crossing of a public highway, it appeared by the testimony of plaintiff's witnesses that plaintiff drove his team at a brisk trot upon the crossing without having stopped to listen for trains; that he had looked, but at a place where a thicket well known to him prevented a view of the track; that if he had looked at any other point he would have seen the locomotive which did the injury. *Held*, that he was guilty of contributory negligence, which debarred him of recovery. He directly contributes to his own injury, who, paying no attention to his own safety, trusts to the obligations imposed upon the company to warn him of an approaching train.

Geo. W. Easley, for appellant.

Leach & Anderson for respondent.

HENRY, J.—This is an action to recover damages for an injury to plaintiff's team of horses and wagon, by a locomotive of defendant passing over its road. The allegation of the petition is that the said locomotive ran against said horses and wagon, driven by plaintiff, in consequence of the negligent and careless manner in which it was managed by defendant's servants, who neglected to blow the whistle or ring the bell as the locomotive approached the crossing at which the accident occurred. The answer is a general denial, and also contains the following special defence: "That at the time of the said alleged injuries and grievances, the defendant's road was in the charge and control of one Sidney McWilliams, who had theretofore been appointed receiver thereof, by the Circuit Court of Livingston county, Missouri, in a suit wherein one Lemuel W. Morse was plaintiff, and this defendant and others

defendants, and each and every one of defendant's officers, servants, agents and employés, enjoined and restrained from managing, controlling or operating defendant's road." This, on motion of plaintiff, was by the court stricken out. A trial resulted in a verdict and judgment for plaintiff, from which defendant has appealed. At the close of plaintiff's testimony defendant asked an instruction in the nature of a demurrer to the evidence, which the court refused.

The court erred in striking out the special defence set up in the answer. If the plaintiff had a cause of action on the facts alleged in his petition, he could, with leave of the Livingston Circuit Court, and not otherwise, have sued the receiver (Barton *v.* Barbour, 13 Rep. 129; s. c. 104 U. S.); but he had no cause of action against the railroad company if the facts stated as a special defence are true. Upon what principle can a company be held liable for any injury inflicted upon any one by a train of cars of which the company had no control? Can the right to operate and manage its road and rolling stock be taken from the company and given to a receiver, under whose control and management it is operated, to the exclusion of the company, and yet the latter be responsible to a person injured in consequence of the negligent operation of the road by such receiver? The question suggests its answer, and it is adverse to the plaintiff. In the brief of respondent's counsel, it is stated that the injury to the horses and wagon in question occurred before McWilliams took charge of the road, but this would have appeared much better in a replication than in a brief.

As, for the error here noticed, the judgment will be reversed, it is proper to add, that on the authority of Fletcher *v.* Pacific Railroad Co., 64 Mo. 484; Harlan *v.* St. L., K. C. and N. R. R. Co., 64 Mo. 480; 65 Mo. 22; Henze *v.* Same, 71 Mo. 636; Purl *v.* Same, 72 Mo. 168, the demurrer to the evidence should have been sustained. The evidence for plaintiff showed that the gravel road from Hannibal west runs parallel with defendant's road for a quarter of a mile east of the crossing at which the injury complained of occurred. For that distance the roads are about 100 yards apart. Plaintiff was travelling west, and the locomotive which struck his team was moving in the same direction. Plaintiff testified for himself that he was returning home from Hannibal; that he looked back when he got to Mrs. Barbee's gate, but the brush was so thick he could not see a locomotive. The gate is on the right-hand side of the gravel road going west, about twenty yards from the railroad. Was going home in a tolerable fast trot, in a two-horse wagon. The locomotive was running backwards. It did not blow the whistle or ring the bell; that he looked after he passed Barbee's gate, but the brush was so thick that he could not see the engine. Hixon, for plaintiff, testified that in travelling on the gravel road going west you can see a train of cars fifty yards this

side of the railroad. Think you can see a train of cars going west at any point 200 yards this side of the railroad, going along the road there, and could have seen that engine and tender; saw the train all the time after it passed me, but did not hear it. Know nothing to prevent plaintiff from seeing it. Don't think he stopped. I was going west. Madden, for plaintiff, testified that fifty yards from the crossing, along the gravel road, could not have seen the train on account of the brush. William Brown, for plaintiff, testified: The railroad company owns all the land between the gravel and railroad, within fifty feet of the latter. You can see the railroad there; don't know that you can see the tracks; it is my opinion you can see an engine there. The railroad is lower than the corner at the crossing; think, after you get down, you couldn't see for the brush, but after you get up on the gravel road my recollection is that you can see a train anywhere along there. Henry Hayden, for plaintiff: A man on the gravel road could have seen the smoke and heard the engine, if he had looked and listened. Bird, for plaintiff: For a quarter of a mile from the crossing the gravel road and the railroad run parallel. The gravel road bears north, but turns south to cross the railroad, south of Barbee's gate. For some distance east and west there was a growth of brush on the side of the railroad track, and the bank it grew upon is from four to six feet high. If a man had stopped within 100 or 150 yards of the crossing, and taken a good look and listened, he might have seen the train coming.

This was substantially the evidence for plaintiff, except that relating to the injury and its extent, which we omit as immaterial to the determination of the question involved, and on the authority of the cases above cited the plaintiff, on the evidence, was not entitled to a verdict. He says he looked for the train at Barbee's gate, and after he passed the gate. This gate was, however, but twenty yards from the railroad, and while, by the testimony of several of his witnesses, he could, by looking from any other point within 100 or 150 yards of the crossing, have seen the train, he never took the precaution to look until he reached a point within twenty yards of the railroad, where a thicket of brush, well known to him, obstructed his view of the road. Defendant's servants were, beyond question, guilty of negligence if they did not ring the bell or blow the whistle, as required by the statute when a train approaches a public crossing, but it is also negligence, gross negligence, for one travelling in a wagon to attempt to drive over a railroad without using ordinary precautions to ascertain if a train is approaching. He directly contributes to his own injury, who, paying no attention to his own safety, trusts to the obligations imposed upon the company to warn him of an approaching train. Here the plaintiff, without looking, except from a point at which he knew he could not see an approaching train, and failing to look

at other points from which he could have seen it, drove, in a brisk trot, on to the track of the railroad, never having stopped to listen for an approaching train.

The judgment is reversed. Sherwood and Hough, JJ., concur; Norton, J., agrees that the Circuit Court erred in striking out defendant's special defence, but thinks the court did not err in overruling the demurrer to the evidence. Ray, J., absent.

See P. C. and St. L. Ry. Co. v. Wright, 5 Am. & Eng. R. R. Cas. 638 and note.

See note 2 Am. & Eng. R. R. Cas. 226.

BILLMAN.

v.

THE INDIANAPOLIS, CINCINNATI AND LAFAYETTE R. R. CO.

(76 *Indiana Reports*, 166. *May Term*, 1881.)

A complaint against a railroad company, alleging that its servants and agents managed and operated its locomotive and cars in such a recklessly and culpably negligent manner as to wilfully and wrongfully cause a team of horses to take fright and run away, and that, because of such fright, and while unmanageable and running away, they ran against the plaintiff's horse and caused its death, contains facts sufficient to constitute a cause of action.

In such case, the fact, that between the wrongful act of the company and the injury complained of was an intervening cause, is not sufficient to defeat a recovery. An intervening agency does not always shield the wrong-doer from responsibility, where the injury flows from his wrongful act.

The maxim, causa proxima, et non remota, spectatur, is not applicable to the case made in the complaint.

Proximate or immediate and direct damages are the ordinary, natural and usual results of an injury, and, being probable, may therefore be expected.

In such case, the injury sued for was the usual and proximate result of the wrongful act of the company, showing, not passive negligence, but wanton and wilful wrong.

The liability of horses to take fright at unusual noises or objects is a thing to be apprehended and guarded against; and the wrong-doer, who does an act likely to cause horses to take fright, must be deemed to be responsible for injuries caused by horses running away under the influence of the fright.

Negligently and wantonly sounding a steam whistle, so that horses lawfully near are caused to run off and inflict an injury, renders a railroad company liable to the one injured by the intervening agency. Facts showing a necessity, or a reasonable excuse, for the use of the whistle, render a different rule applicable.

FROM the Shelby Circuit Court.

O. J. Glessner and E. S. Stilwell, for appellant.

L. J. Hackney, for appellee.

[illegible] —This appeal presents the question of the sufficiency [illegible] complaint [illegible] from [illegible] action was instituted. [illegible] unnecessary [illegible] more than [illegible] are outline the allegations [illegible] complaint [illegible] objections urged against it here, and which [illegible] against it in the trial court, are of such a character as to require [illegible] very general statement from us. It is charged that the servants and agents of the appellee managed and operated the cars and cars of the railway company in such a carelessly and unlawful negligent manner as to wilfully and wrongfully cause a team of horses, belonging to one Zero Carter, to take fright and run away, and that, because of such fright, and while unmanageable and running away, they ran against the horse of appellant and caused its death.

In a carefully prepared and very able brief, appellee's counsel urges that no cause of action is shown, because the result was one which the appellee's servants could not have anticipated, and because the injury was not the proximate result of the negligence of the servants of the appellee. The argument is built, and built with skill, upon the maxim, causa proxima, et non remota, spectatur.

It is true, as urged by counsel, that the injury alleged as the cause of action did not directly and immediately result from appellee's negligence, for there was an intervening agency. The premise is well assumed, and the question is: Does the conclusion drawn by the appellee logically follow? If the maxim quoted is to be given the wide sweep which appellee claims, then, wherever there is an agency intervening between the original cause and the injury, there can be no recovery. This is not the law. An intervening agency does not always shield the wrong-doer from responsibility, where the injury flows from his wrongful act. This doctrine is a well established one. It is said, by an English writer of acknowledged ability and learning, that "the general rule of law, however, is, that whoever does an illegal or wrongful act is answerable for all the consequences that ensue in the ordinary and natural course of events, though those consequences be immediately and directly brought about by the intervening agency of others, provided the intervening agents were set in motion by the primary wrong-doer." Addison Torts, sec. 12.

[illegible] and very famous case of Scott v. Shepherd, 2 W. [illegible] decided that a wrong-doer, who wrongfully [illegible] was liable, although [illegible] there were intervening causes, [illegible] the concurrent [illegible] sanction of courts and [illegible] In discussing this subject, [illegible] would naturally, [illegible] to some [illegible] result in injury through

the intervention of other causes which are not wrongful, the injury shall be referred to the wrongful cause, passing by those which were innocent." Cooley Torts, 70. The fact that, between the wrongful act of appellee and the injury complained of, there was an intervening cause, is not sufficient to defeat a recovery.

The injury for which a recovery is sought is not so remote from the original wrong as to defeat the right to recover for the damages flowing from the injury. The wrong of appellee set in motion the cause which produced the injury. There are many cases which support the theory upon which appellant's complaint is rested. The case of Thomas *v.* Winchester, 6 N. Y. 397, is an important and instructive case upon this point. In that case a dose of dandelion was prescribed for a person who was at the time ill. The prescription was presented at the drug-store of Dr. Foord, and the medicine obtained, which was administered to the person for whom it was prescribed, and great suffering resulted from its use. It was afterwards ascertained that the drug was belladonna, and not dandelion. The drug was taken from a jar of medicine prepared by the defendant, a manufacturing chemist, and which had been by him labelled as extract of dandelion. The defendant sold the jar and its contents to one Aspinwall, a wholesale dealer in drugs, by whom it was sold to Dr. Foord, the retail dealer, from whom the plaintiff purchased it. The court adjudged the defendant liable.

Cockburn, C. J., in Clark *v.* Chambers, 7 C. L. J. 11, very carefully investigated the question here under examination, and in an opinion of great force held that the author of the original wrong was liable, although the act of another had wrongfully intervened. In that case the defendant had wrongfully placed a dangerous spiked hurdle in a private way along which the plaintiff had a right to pass. Some person, without the knowledge of the defendant, moved the hurdle a short distance. The plaintiff, in travelling the way in a dark night, and thinking to avoid the original portion of the hurdle, came into collision with it, and was injured. Judgment was given in his favor. Many cases were reviewed; among them Scott *v.* Shepherd, 2 W. Bl. 892; Dixon *v.* Bell, 5 M. & S. 198; Ilott *v.* Wilkes, 3 B. & Ald. 304; Illidge *v.* Goodwin, 5 C. & P. 190; Lynch *v.* Nurdin, 1 Q. B. 29; Burrows *v.* The March, etc., Co., L. R., 7 Exch. 96.

In Ricker *v.* Freeman, 50 N. H. 420, the general doctrine of liability, where there is an injury resulting from a remote wrong, is considered with care, and a result reached in harmony with the cases decided by the New York court.

The Supreme Court of Minnesota, in Griggs *v.* Fleckenstein, 14 Minn. 81, had occasion to apply the law to a case where the facts were substantially these: The defendant negligently left a team of horses, unhitched and unwatched, upon the street of a town.

They ran away, and ran against the team of another person, hitched to a post on the street, caused it to take fright and run against a horse and sleigh of the plaintiff. It was held that the defendant could not escape liability upon the ground that the injury was too remote.

The case of Weick *v.* Lander, 75 Ill. 93, is a well reasoned and interesting case. The facts in that case, shortly stated, were that a builder wrongfully placed an obstruction in a public street of the city of Chicago. Two teams and wagons, employed in hauling sand, were passing upon the street, going south. When opposite the obstruction, an express wagon, moving north, ran against the obstruction and also struck and stopped the front sand wagon, and the tongue of the rear sand wagon ran against and killed a lad who was riding in the front sand wagon; and it was held that the builder was liable, because the wrongful obstruction was the cause of the boy's death.

There are several cases in the Supreme Court of Massachusetts, in which the question we have under examination is discussed, and discussed with learning and ability. In one of these cases, that of Powell *v.* Deveney, 3 Cush. 300, an empty truck was wrongfully left standing upon a public street; on the opposite side of the street there was a loaded truck, to which a team of horses was attached. The driver of another truck, in attempting to pass between the horses' heads and the empty truck on the opposite side of the street, drove against the last-mentioned truck, which caused the shafts of his truck to whirl round and injure a person walking along the sidewalk. And it was decided that the owner of the empty truck was liable to the injured person. Another of the cases in the reports of the State to which we have referred collects and reviews many of the earlier cases, and holds that the doctrine of the case last cited is the correct one. In the case under immediate mention, McDonald *v.* Snelling, 14 Allen, 290, a carriage was negligently driven against a team of horses, causing them to take fright, run away, and injure the plaintiff. In the opinion, the maxim upon which appellee relies was much discussed, and its true force and meaning explained. In still another case, Lane *v.* Atlantic Works, 111 Mass. 136, the same court gave the subject a very full examination, and held, that although the act of another wrong-doer intervened between the original wrong and the injury, the injured person was entitled to recover. The ruling, upon the point here mentioned, is thus stated in the reporter's note: "In an action to recover for injuries caused by the defendant's negligence, to which the fault of another person contributed, the defendant's liability is not affected by the fact that the fault of such person was not negligence, but voluntary wrong-doing, if it was conduct which they should have apprehended and provided against." This goes far beyond what we should be required to do to uphold the

present case, for here the act of the person whose agency intervened was not only innocent, but was one which he could not have prevented, for it is shown that his horses were uncontrollable because of fright. There are other decisions of the Massachusetts court, which are well deserving of examination, but we have only time to refer, without comment, to some of them. Metallic C. C. Co. *v.* Fitchburg R. R. Co., 109 Mass. 277; Lane *v.* Atlantic Works, 107 Mass. 104; Tutein *v.* Hurley, 98 Mass. 211.

Two cases are cited by the appellee, The Pennsylvania R. R. Co. *v.* Kerr, 62 Pa. St. 353, and Ryan *v.* The New York, etc., R. R. Co., 35 N. Y. 210. In both of these cases, it was held that a railroad company is not liable to the owner of a house consumed by fire, communicated from another house situated at some considerable distance from it, and which was set fire by sparks emitted from the locomotive of the company. These cases are in conflict with the overwhelming weight of authority, and cannot be deemed true interpretations of the law Judge Cooley, in his work on Torts, cites a very great number of cases, in which the Pennsylvania and New York doctrine is disapproved. Among the citations of this distinguished author are decisions of the English courts, of the Supreme Court of the United States and of the courts of nearly all the States of the Union. Cooley Torts, 76, n. Of the cases cited, the Supreme Court of Illinois said: "These two cases stand alone, and we believe they are directly in conflict with every English or American case, as yet reported, involving this question." Fent *v.* The Toledo, etc., Ry. Co., 59 Ill. 349.

There are cases in New York declaring and enforcing principles, with which the case cited by appellee cannot be made to harmonize. One of these is the case of the apothecary, which we have already considered. Another is that of Guille *v.* Swan, 19 Johns. 381, where the doctrine, that one is liable for the remote consequences of his act, was extended much beyond what would be necessary to support the appellant's complaint. In that case it was held that one who ascended in a balloon, and came down upon the garden of another, was liable for the injury caused by a crowd of persons attracted to the garden by the descent of the balloon. Still another, and perhaps a more strikingly illustrative case, is that of Vandenburgh *v.* Truax, 4 Denio, 464. In that case the defendant engaged in an altercation with a negro boy and menaced him with a weapon. The boy, pursued by the defendant, fled in fear from the defendant, and, in the course of his flight, ran into the store of his employer, and, striking against a faucet of a cask of wine, caused the wine to be spilled and lost, and it was held, in a vigorous and forcible opinion, delivered by Bronson, C. J., that the defendant was liable to the owner of the wine.

In Webb *v.* The Rome, etc., R. R. Co., 49 N. Y. 420, the plaintiff sued for injuries caused by fire communicated to a tie on

the track of the railway company, by the latter's locomotives, and, by the burning tie, to the plaintiff's property, and it was held that the action would lie.

In the still later case of Pollett *v.* Long, 56 N. Y. 200, the defendant negligently constructed a dam across a stream, which gave way and carried out another negligently constructed dam, and thus caused injury to the plaintiff's property, and the defendant was held liable. The trial court instructed the jury that the injury was too remote, evidently acting upon Ryan *v.* The New York, etc., R. R. Co., supra, but the instruction was held erroneous and the judgment reversed. The same court, in Wasmer *v.* The Delaware, etc., R. R. Co., 80 N. Y. 212, held that a railway company was liable for any injury done by a runaway horse, the cause of the horse's fright being the negligent manner in which the company's servants ran a locomotive and train through the city of Utica. Counsel there argued: "The respondent should have been nonsuited, because she failed to show that the negligence of appellant was the sole and proximate cause of the death. The runaway horse and wagon was the proximate cause of the accident." The case of Ryan *v.* The New York, etc., R. R. Co., supra, was cited by counsel, but the court passed it unnoticed. Without further citation of cases, we think it may be safely affirmed that, upon the principle which governs the case before us, the court which decided Ryan *v.* The New York, etc., R. R. Co., supra, is clearly in line with the view to which we are here disposed to give our adherence.

It is not necessary that the precise injury which actually occurred could have been reasonably anticipated at the time the original wrong was committed. It is true that the resultant injury must be of such a general character as might have been reasonably foreseen and provided against. The liability of horses to take fright at unusual noises or objects is a thing to be apprehended and guarded against. Says Dr. Wharton: "Certainly it will not be maintained that it is an unusual and unnatural thing for horses, when travelling on a road, to be frightened by extraordinary noises or sights. He, therefore, who, on a road travelled by horses, makes such noises or exhibits such spectacles, is liable for any damage caused by a horse taking fright. This rule has been applied to protect the public using a road from the effect of a jet of water likely to frighten horses coming along it, the jet of water being caused by the defendants, the New River Company, in the exercise of their statutory powers; and to make a town liable for objects left on a road having a like tendency to frighten horses." Wharton Negligence, sec. 107. It is upon this ground that the cases proceed, which hold that a municipal corporation is liable for negligently permitting objects likely to frighten horses to remain upon, or in close proximity to, the public streets. Dillon

Municipal Corporations, sec. 1007. The wrong-doer, who does an act likely to cause horses to take fright, must be deemed to be responsible for injuries caused by horses running away under the influence of the fright. This responsibility is not to be confined to the horses which suffer directly and immediately from the fright, but must be held to extend to such injuries as may be reasonably expected to be caused by them while running away. It is not unusual or unnatural, for horses panic-stricken by fear, to run against and injure persons and property, and what is neither unnatural nor unusual the wrong-doer must be held to have anticipated. In illustration of the doctrine, that it is not necessary that the particular injury could have been foreseen, may be cited the case of Hill *v.* Winson, 118 Mass. 251. In that case the court, upon the trial, instructed the jury that "the accident must be caused by the negligent act of the defendants; but it is not necessary that the consequences of the negligent act of the defendants should be foreseen by the defendants. It is not necessary that either the plaintiff or the defendants should be able to foresee the consequences of the negligence of the defendants, in order to make the defendants liable. It may be a negligent act of mine in leaving something in the highway. It may cause a man to fall and break his leg or arm, and I may not be able to foresee one or the other. Still, it is negligence for me to put this obstruction in the highway, and that may be the natural and necessary cause." This instruction was held to be correct, the court saying: "It cannot be said, as matter of law, that the jury might not properly find it obviously probable that injury in some form would be caused to those who were at work on the fender by the act of the defendants in running against it. This constitutes negligence, and it is not necessary that injury in the precise form in which it in fact resulted should have been foreseen. It is enough that now it appears to have been a natural and probable consequence. Lane *v.* Atlantic Works, 111 Mass. 136, and cases cited." What is usual, the law requires the person doing a wrong to anticipate and provide against. A wrong-doer cannot escape liability upon the ground that the injury resulting from the wrong was too remote, if it was in fact a usual or probable one. Proximate results are such as are natural or usual. It was said in Henry *v.* The Southern Pacific R. R. Co., 50 Cal. 176, that "a long series of judicial decision has defined proximate, or immediate and direct damages to be the ordinary and natural results of the negligence; such as are usual and as, therefore, might have been expected." Speaking of the quotation we have made from the case cited, Mr. Thompson says that the definition of the court is given with little variation in many cases, and, in support of this statement, a great number of cases are cited. 2 Thompson Negligence, 1083. In the case in hand the injury was a usual one, within the

meaning of the law, for it was neither extraordinary or unnatural. The probability that horses lawfully driven, upon a much-travelled public highway, will take fright at extraordinary noises, is one which he who causes such noises to be made must, in contemplation of law, foresee and provide against. Nor does this duty of forecasting stop at this precise point, for he must also foresee the ordinary behavior of horses fleeing under the influence of fear. To hold otherwise would be to enable the wrong-doer to protect himself from what might have been reasonably expected to result, by proof that he did not foresee what actually occurred. The law is not justly subject to the reproach of showing favor to any such doctrine. What was to have been expected in the ordinary course of things the wrong-doer did, in the eyes of the law, foresee and expect.

We are satisfied that, both upon principal and authority, it must be held that the injury for which the appellant sues is, as shown by the confessed averments of the complaint, the usual and proximate result of the wrongful act of the appellee.

The allegations of the complaint are unusually full and strong, and show not merely passive negligence, but wanton and wilful wrong. The use of the steam whistle by locomotives may be of such a character as to constitute an actionable injury. The rule upon this subject is thus stated by an American author: "Where the whistle is negligently and wantonly sounded, so that horses lawfully in the vicinity are caused to run off and injury is inflicted, it is correctly held that the company is liable." Wharton, sec. 836; Voak *v.* Northern, etc., Ry. Co., 75 N. Y. 320. It is, as we understand appellee's argument, not denied that there are cases where the negligent and wanton sounding of steam whistles may constitute a cause of action; nor do we understand counsel as contending that the facts stated in the complaint are insufficient to bring this case within the rule. The contention is, not that the facts stated would not have constituted a cause of action in favor of the person whose horse took fright and ran off, had injury resulted to him, but that the injury to the appellant is too remote even though the complaint shows an actionable wrong. The real question, therefore, which the course of argument adopted presents, is as to the remoteness of the injury. The question as to whether there was an original wrong is not, in fact, debated. Of course, there must have been an original wrongful act, and this presents incidentally only the question as to whether the sounding of steam whistles by locomotive engineers can be deemed to constitute actionable negligence. It is undoubtedly true that the law is much more liberal in favor of railway companies operating locomotives than others, for there are cases in which others than those engaged in operating railway engines would be liable, but in which no action could be maintained against the latter. But,

while this is so, there are cases where the railway company may be liable for the improper and negligent sounding of the whistle. Of course the mere sounding of the whistle cannot be deemed negligence, although blown in close proximity to the highway, and even though there are horses in the immediate vicinity. There may, however, be attendant facts and circumstances which show it to be culpable negligence. Wharton Negligence, sec. 898, and author's note; Voak *v.* Northern, etc., Ry. Co., supra; The People *v.* New York, etc., R. R. Co., 25 Barb. 199; Culp *v.* Atchison, etc., R. R. Co., 17 Kan. 475.

There are, in this case, no facts or circumstances showing an excuse for sounding the whistle in the manner in which it was done; on the contrary, it is fully and distinctly shown that the whistle was wantonly sounded at an improper place, in a wilfully and dangerously negligent manner, and without excuse or justification. If there were facts, we deem it proper to add, to prevent possible misunderstanding, showing a necessity for the use of the whistle, or even showing a reasonable excuse for using it at the place and in the manner in which it was used, then a rule different from that which we here apply would be applicable.

Judgment reversed.

It is well settled by numerous authorities that the right to operate a railroad includes the right to make the noises incident to the movement and working of its engines and to give the usual and proper admonitions of danger, as in the sounding of whistles and the ringing of bells. It is therefore not liable, while exercising its right in a lawful and reasonable manner, for injuries occasioned to horses when being driven along the highway who take fright at such noises. Coy *v.* Utica & S. R. R. Co., 23 Barb. 643; Flint *v.* Norwich & W. R. R. Co., 110 Mass. 222; Norton *v.* Eastern R. R. Co., 113 Mass. 336; Favor *v.* Boston & L. R. R. Co., 114 Mass. 350; Burton *v.* P. W. & B. R. R. Co., 4 Harrington, 252; Whitney *v.* Maine Central R. R. Co., 69 Me. 208; Hudson *v.* L. N. R. R. Co., 14 Bush, 303; P. W. & B. R. R. Co. *v.* Stinger, 78 Pa. St. 219; Hall *v.* Brown, 54 N. H. 495; Chicago, etc., R. R. Co. *v.* Dunn, 61 Ill. 385; Macomber *v.* Nichols, 34 Mich. 212; Drayton *v.* North Penna. R. R. Co., 10 W. N. C. (Phila.) 55.

Where, accordingly, a horse travelling upon a highway became frightened by reason of the passage of a railway train upon a bridge overhead, it was held that the railway company were not liable for the consequences. Fava *v.* Boston & L. R. R. Co., 114 Mass. 350. But if the injury complained of would not have occurred had it not been for some breach of duty on the company's part, the company will be held liable. Moshier *v.* Utica & S. R. Co., 8 Barb. 427; Weiss *v.* Penna. R. R. Co., 79 Pa. St. 387; Culp *v.* R. R., 17 Kansas, 475; Ind., etc., R. R. Co. *v.* McBroun, 46 Ind. 229; Sneesby *v.* R. R. Co., L. R., 9 Q. B. 263.

If a railroad train, therefore, fail to give the usual warning of its approach and in consequence a horse be driven so near that it takes fright as the train comes up, and is injured, the company will be held liable. Prescott *v.* Eastern R. R. Co., 113 Mass. 370; Pollock *v.* Eastern R. R. Co., 124 Mass. 158; Pennsylvania R. R. Co. *v.* Barnett, 59 Pa. St. 529; P. W. & B. R. R. Co. *v.* Stinger, 78 Pa. St. 218; Hart *v.* Chicago, R. I. & P. R. R. Co., 7 N. W. Rep. 9; Voak *v.* Northern Cent. Ry. Co., 75 N. Y. 320; Pittsburgh, etc., R. R.

Co. v. Jundt, 3 Am. & Eng. R. R. Cas. 502. And where a horse, frightened in the manner above described, ran against a railing and was injured, a similar conclusion was reached. Titcomb v. Fitchburg Ry. Co., 12 Allen, 254.

On the other hand, a railroad company is bound to exercise care in using its signals. It must not sound its bells or whistles in improper places where they would be likely to frighten horses. Toledo, W. & W. R. R. Co. v. Harmon, 47 Ill. 298; Chicago, B. & Q. R. R. Co. v. Dickson, 88 Ill. 431; Georgia R. R. Co. v. Newcome, 60 Ga. 492; Phila. & Reading R. R. Co. v. Kellepa, 88 Pa. St. 405.

The whistle should not, for example, be sounded directly under a bridge over which the highway passes. If this be done the company will be held liable for an injury occasioned by the frightening of a horse passing overhead. Pennsylvania R. R. Co. v. Barnett, 59 Penna. St. 259. Nor should it be blown near a highway crossing unless the circumstances be such as to clearly indicate that it was prudent to do so in order to give the public an intimation of the approach of the train. Manchester, S. J. & A. R. R. Co. v. Fullarton, 14 C. B. (N. S.) 43.

The engine must not let off steam at an improper place. Borst v. Lake Shore & M. S. R. R. Co., 4 Hun, 346. And it has been intimated that it is more proper to use the bell as a signal for starting than the whistle. Hill v. Portland, etc., R. R. Co., 55 Me. 438.

The contributory negligence of the plaintiff in undertaking to drive in the neighborhood of a railroad an untrained or vicious horse, or one easily frightened by a passing train, or in driving his horse unnecessarily into a place of danger, will preclude recovery even though the company may have been guilty of negligence. Murdock v. Warwick, 4 Gray, 178; Bliss v. Wilbraham, 8 Allen, 564; Whitney v. Maine Central R. R. Co., 69 Me. 208; Chicago & N. W. R. R. Co. v. Clark, 2 Bradf. (Ill.) 116; Goldstein v. Chicago, M. & St. P. R. R. Co., 46 Wis. 404; Phila., W. & B. R. R. Co. v. Stinger, 78 Pa. St. 219.

But if the noise which has occasioned the injury be made maliciously or wantonly, it seems that the plaintiff may nevertheless recover. Chicago, B. & Q. R. R. Co. v. Dickson, 88 Ill. 431.

Where a horse is left unhitched by its owner and, becoming frightened by the noise of a train, runs away, causing an injury, it seems that the question whether the owner has not been guilty of such contributory negligence in leaving him unhitched as to preclude recovery, is for the jury. Southworth v. Old Colony & N. R. R. Co., 105 Mass. 342; Denville v. Southern Pacific R. R. Co., 50 Cal. 383. But in one case it has been held that such conduct does not amount to contributory negligence unless the horse was a restive and vicious one. Albert v. Bleecker St. Ry. Co., 2 Daly, 389.

Upon the other point involved in the principal case, viz., whether or not the negligence of the company defendant could properly be deemed the proximate cause of the injury suffered, but little remains to be said. The opinion itself contains an exhaustive resumé of the chief authorities. See Topeka v. Tuttle, 5 Kansas, 425; Oliver v. La Valle, 39 Wis. 592; Jucker v. Chicago, etc., R. R. Co., 52 Wis. 150; Scheffer et al. v. Washington City, etc., R. R. Co., supra, p. 38; also 2 Thompson on Negligence, page 1088 et seq.

BAUGHMAN

v.

THE SHENANGO AND ALLEGHENY R. R. CO.

(92 *Pennsylvania Reports*, 385. *January* 5, 1880.)

In crossing a railroad track at a crossing the horse which plaintiff was driving caught his foot in the space between the rail and the plank on the crossing and fell down on the track. Plaintiff alighted and endeavored for about two minutes to extricate the foot, when a train came along and broke the horse's leg. In a suit for damages the court nonsuited the plaintiff invoking the rule that he should have "stopped, looked, and listened," before approaching the crossing. *Held*, that the rule was not applicable to the case; that the true question was whether the company was guilty of negligence in allowing the track at the crossing to be in an insecure condition, and that this question should have been submitted to the jury.

NOVEMBER 27th, 1879. Before SHARSWOOD, C. J., MERCUR, GORDON, PAXSON and TRUNKEY, JJ. STERRETT and GREEN, JJ., absent.

Error to the Court of Common Pleas of Mercer County: of October and November Term, 1879, No. 186.

Case by William Baughman against the Shenango and Allegheny R. R. Co., to recover damages for an injury to a horse and wagon alleged to have been caused by the negligence of defendants.

The Shenango and Allegheny R. R. crosses the public highway leading from Mercer to Franklin, about two miles distant from Mercer. During the winter of 1877, the crossing at this point was out of repair. The plank on the inside of the rail had become worn or misplaced, so as to leave an open space four and five eighth inches wide between it and the rail. This space rendered the crossing unsafe to travellers, as it was wide enough to admit a horse's foot, and on account of its depth and shape, it so fastened the foot of the horse that stepped into it, as to render it difficult to extricate his foot without assistance. The crossing remained in this condition for several weeks prior to the day in February, 1877, upon which the plaintiff sustained the injury complained of, during which time different travellers had encountered difficulty by their horses' feet becoming fast in the crossing.

Some time in February, 1877, the plaintiff had been at Mercer, and was returning home with his wife in a one-horse buggy. When he approached this railroad crossing, he drove very slowly—bringing his horse almost to a halt. The railroad was visible for a long distance in both directions, but there was no train within sight or hearing. Just as the horse stepped upon the railroad, his foot be-

came fast in the space between the rail and the plank, and in his efforts to withdraw it, he threw himself down upon the track. The plaintiff immediately alighted from the buggy and attempted to loosen his horse's foot by working it back and forth with his hands. He labored in this manner for about two minutes, but with no success. The horse's foot was fastened in such a way that he could not even arise. The plaintiff then told his wife, who had remained in the buggy, to alight and assist him. She alighted from the buggy and looked down the track where she saw the locomotive of a freight train just coming in sight. She then ran down the railroad waving her handkerchief and calling to the engineer to stop, while the plaintiff was still trying to get his horse's foot loose. The train was a heavy one and moved slowly up grade and over the crossing, breaking the horse's leg and otherwise injuring him, and demolishing the buggy and harness. This suit was brought by the plaintiff to recover damages for the loss of the horse, buggy and harness.

At the trial, before McDermitt, P. J., the plaintiff proposed to prove the value of the buggy which was in the possession of the plaintiff on the day of the collision, and which was destroyed by the collision, for the purpose of showing what damage was sustained by plaintiff, by means of the destruction of said property which was in his possession at the time, as bailee.

Defendant objected to above offer because:

1. The evidence in the case shows that the plaintiff was not the owner of the buggy and harness, but was using them that day by the kindness of the owner.

2. Because the testimony does not show that the buggy and harness were destroyed, but only slightly injured, and if the defendant is responsible in damages it could only be for the amount of the same and not for the worth of the harness and buggy.

The court.—"The evidence of the plaintiff and wife thus far shows that the buggy and harness were borrowed from W. H. Reed, and such evidence showing that said Reed is the party who should have instituted suit for the recovery of the damages sustained by such buggy and harness, if any, no evidence will be heard in regard thereto."

The plaintiff having closed his evidence, the defendant moved for a nonsuit, which the court granted, for the reason that the plaintiff did not stop his horse to look and listen for trains before attempting to cross the railroad. A motion was subsequently made to take off this nonsuit, which the court refused. This refusal, and the ruling upon the above evidence, were assigned for error by plaintiff, who took this writ.

S. H. Miller and B. Magoffin, Jr., for plaintiff in error.—The neglect to stop, look, and listen, had no connection with the accident, and could not have contributed to it. The law did not com-

mand plaintiff to stop, look, and listen, in order to avoid the danger of a defective crossing, and therefore his disobedience could not be declared contributory negligence, per se, as it is in cases where the injury results directly from the cause which he was warned to avoid. All the plaintiff seeks to recover is damage for whatever injury he sustained by reason of his horse becoming fast in the crossing. The horse was thrown down, and his shoe pulled off before the engine struck him. This was some injury, and entitled the plaintiff to nominal damages, at least. His right of action was, therefore, complete before he was injured by the train, and it was wrong to nonsuit him. The defendant was liable for all damages which were the direct result of the defect in the crossing, and if such defect was the immediate cause of the injury the plaintiff sustained from the train, he was also entitled to recover. This was a question of fact under the evidence, and ought to have been submitted to the jury.

S. Griffith and Stranahan & Mehard, for defendant in error.—The rule that a person approaching a railroad crossing must stop, look, and listen, is based upon an absolute necessity of stopping as a safeguard to the travelling public, and also a duty to the traveller himself.

If this rule is not applicable to this case, we could not imagine a case to which it would apply. Here there was a collision, and this fact showed the necessity of stopping; and, as in every case of collision the rule must be an unbending one, the failure of the plaintiff to do so in this case bars his action for damages, on the ground of contributory negligence.

PAXSON, J.—The first assignment of error is not sustained. The evidence offered to show the value of the harness and buggy was properly rejected. The plaintiff had already testified that they belonged to W. H. Reed, who had loaned them to him. It was not error, therefore, for the learned judge to say, that Reed was the proper person to sue for the alleged injury to said articles. A recovery by plaintiff would have been no bar to a suit by the owner.

The second and third assignments present a graver question. The court below nonsuited the plaintiff upon the ground that he did not stop and look and listen before attempting to cross the track. The rule invoked is a valuable one, and sustained by several well-considered cases, among which may be mentioned R. R. Co. *v.* Heileman, 13 Wright, 60; Hanover R. R. Co. *v.* Coyle, 5 P. F. Smith, 396, and Penna. R. R. Co. *v.* Beale, 23 id. 504. We do not propose to depart from this principle nor to weaken its force. We are unable to see its applicability to this case, however. The injury, as developed by the plaintiff's testimony, was not the result of a failure to observe the rule. Had he stopped, looked, and listened, it is not probable he would have seen or

heard the train, for the reason, that it was too far off to have been present to any of the senses. The trouble was that the horse which plaintiff was driving caught his foot in the space between the rail and the plank at the crossing, and fell down on the track. The plaintiff got out of the buggy and endeavored to get his horse upon its feet again. But this was not an easy task, as one of its feet was fast. After working unsuccessfully in this manner for about two minutes, he told his wife to get out of the buggy. She did so, and shortly thereafter heard the cars coming, upon which she ran up the road to meet them, signalling them at the same time to stop. The warning came too late, and the train passed over one leg of the horse, and damaged the harness and buggy to some extent. There was evidence that the track was out of order at the point where the accident occurred; that the flange way was too wide—one witness says four inches and five eighths—and that other horses had been caught in the same way before. The true question in the case therefore was, whether the company were guilty of negligence in allowing the track at the crossing to be in an insecure condition, and this question should have been submitted to the jury.

Judgment reversed, and a venire facias de novo awarded.

See note, p. 57.

Martin Payne, Appellant,

v.

The Troy and Boston R. R. Co., Respondent.

(83 *New York Reports*, 572.)

In an action to recover damages for alleged negligence, plaintiff is entitled to have the issue of negligence submitted to the jury when it depends upon conflicting evidence, or on inferences to be drawn from circumstances in regard to which there is room for a difference of opinion among intelligent men.

While plaintiff was driving his mare across the track of defendant's road at the intersection of two streets in the city of T., her foot caught between the planking and one of the rails and she was injured. Upon the trial of an action to recover damages, plaintiff's evidence was to the effect that *there* was over three and one fourth inches between the plank and the rail, while two and one quarter inches was all that was required for the passage of the flanges of the car wheels, and because of this the horse's hoof got into the open space and the toe-calk caught under the rail; that the plank was from one fourth to three eighths of an inch higher than the top of the rail; and that the crossing was constructed differently from others upon defendant's road and upon other railroads. Plaintiff was nonsuited on the ground that there was no

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evidence of negligence on the part of defendant. *Held*, error; that the question of negligence was one of fact for the jury.

(Argued December 22, 1880; decided January 25, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the third judicial department, entered upon an order made September 19, 1879, which affirmed a judgment in favor of defendant, entered upon a nonsuit and affirmed the order denying a motion for a new trial.

This action was brought to recover damages for injuries to plaintiff's mare, alleged to have been caused by defendant's negligence.

The facts appear sufficiently in the opinion.

R. A. Parmenter, for appellant. Defendant was liable for damages resulting from its negligence in not properly constructing the crossing and allowing it to get out of repair. (Wooster *v.* Forty-second and Grand Street R. R. Co., 50 N. Y. 203; Rockwell *v.* Third Ave. R. R. Co., 64 Barb. 438; Shearman and Redfield on Negligence, § 446.) To charge the defendant with liability for the injury done required no previous notice that the space between the plank and the rail was too wide. (Griffin *v.* The Mayor, etc., 9 N. Y. 456.) The fact that the track was out of repair, and that an injury had been caused by it, was strong evidence of negligence on the part of the defendant, and the burden was upon the defendant to produce countervailing proof to shift the responsibility from it to the plaintiff. (Maloy *v.* N. Y. C. R. R. Co., 58 Barb. 182.) The question of negligence should have been submitted to the jury. (Casey *v.* N. Y. C. and H. R. R. R. Co., 78 N. Y. 518; Mussoth *v.* D. and H. C. Co., 64 id. 524.)

Esek Cowen, for respondent. The evidence was not sufficient to allow the jury to base a verdict of negligence upon it. (Toomey *v.* Ry. Co., 91 C. L. 146; Cotton *v.* Wood, 98 id. 572.)

MILLER, J.—The plaintiff's mare was injured while he was driving her slowly, and crossing the defendant's railroad at the intersection of two streets in the city of Troy, by her left hind foot being caught between the planking and the southerly iron rail of said railroad.

The testimony upon the trial was conflicting in regard to the alleged defects in the planking of the crossing and the condition of the same at the time of the injury. It was proved by the plaintiff, upon the trial, that the plank was so placed that there was a space of a little more than three and one quarter inches between the plank and the iron rail, which space was for the passage of the flanges of the wheels of the cars; and the evidence of the plaintiff showed that two and one quarter inches was all which was required for that purpose, and hence the space was at least one inch wider than it should have been, and this, it was claimed, caused the horse's hoof to get into the open space and to be caught by the toe-calk

under the iron rail. It also appeared, from the evidence introduced by the plaintiff, that the plank was from one quarter to three eighths of an inch higher than the top of the rail. At the close of the testimony a motion was made for a nonsuit, upon the ground that there was no evidence that the company was guilty of negligence in the construction of the crossing, or that the crossing was improperly constructed, or that it was any more dangerous on account of the planking or the width of the opening. The motion was granted, and the plaintiff excepted.

The evidence tended to show that the crossing was constructed in a manner different from other crossings upon the defendant's railroad and upon other railroads; that the space between the plank and the rail was wider than was necessary, and thus the danger of travelling over the crossing was increased; and it was claimed that this mode of construction and of maintaining the crossing, as well as the fact that the plank was higher than the top of the rails, established negligence on the part of the defendant. The question of defendant's negligence, as the evidence stood, was one of fact for the consideration of the jury; and if there is any evidence from which a jury might find in favor of the plaintiff, the case should not be withdrawn from their consideration. The testimony here as to the defendant's negligence is not very strong, and the case is a very close one on the question of such negligence; yet it was not so destitute of facts and circumstances for the consideration of the jury, and so clear against the plaintiff, as to leave no room for doubt, and to justify the court in holding that there was no evidence of negligence. It is a well-settled rule, that it is a matter of right in the plaintiff to have the issue of negligence submitted to the jury, when it depends upon conflicting evidence, or on inferences to be drawn from circumstances in regard to which there is room for a difference of opinion among intelligent men. (Wolfkiel *v.* Sixth Avenue R. R. Co., 38 N. Y. 49; Weber *v.* N. Y. C. and H. R. R. R. Co., 58 id. 451; Hart *v.* H. R. Bridge Co., 80 id. 622.) The plaintiff's case is manifestly within the rule laid down in the cases cited. The track of the defendant's road being across a public highway, it was its duty to construct and keep the same in such a manner as would subserve the legitimate purposes of the corporation, and, at the same time, interpose no serious obstructions to the public travel on the highway across the railroad, and cause injury to horses while crossing the railroad.

The question whether this was done was one of fact; and, while it may well be that the width between the rail and the plank originally was no more than was usual, and the widening thereof was occasioned by the ordinary travel on the railroad, without any want of care or any negligence of the defendant, this was a matter for the jury to determine, upon the proof given and the circumstances presented, as triers of fact. It was not, we think, for the

court to say, in the face of the evidence introduced by the plaintiff, although the testimony was contradicted, that there was no question for the jury, and to direct a nonsuit.

We are, for the reasons stated, of the opinion that the court erred in granting the nonsuit, and that the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur, except FOLGER, Ch. J., and RAPALLO and EARL, JJ., dissenting.

Judgment reversed.

The question raised by the two cases above reported is the obligation of railroad companies to keep their tracks at points where they are crossed by highways in good order and repair. That the obligation exists cannot be doubted. When the company is granted the privilege of constructing its road across streets and highways it impliedly undertakes to accommodate the public by keeping its track in such a condition as shall afford the least possible obstruction to traffic. If, in consequence of a violation or neglect of its duty in this respect, injury is occasioned to a passer-by, the company must respond in damages. Rockwell v. Third Avenue R. R. Co., 64 Barb. 488. In Cuddiback v. Jewett, 20 Hun, 187, the evidence showed that the foot of the plaintiff's horse had been caught in an interstice, carelessly left between the rail and the planking of the crossing, and that in the endeavor to withdraw it the hoof had been wrenched off. Leaving the crossing in such a state as to occasion the accident was held to be negligence per se on the part of the defendant, who was accordingly obliged to respond in damages.

A similar conclusion was reached in Gillett v. Western Ry. Corp., 8 Allen, 560, where the facts were substantially the same. See Pakalinsky v. N. Y., etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 251.

In the case of Pitts., Ft. W. and Chicago R. R. Co. v. Dunn, 56 Pa. St. 280, the wheel of plaintiff's carriage was caught while crossing defendant's track by a similar interstice, and being detained was run down by a passing train on the defendant's road. Here also the defendant was held liable.

Somewhat similar was the case of Milwaukee and Chicago R. R. Co. v. Hunter, 11 Wis. 160, where it appeared that the company defendant had just raised the grade of the crossing so as to considerably retard the speed of passing vehicles, and that while the plaintiff's carriage was endeavoring to cross the same, was struck by a train running at great speed and without giving any warning of its approach. Here it was held that viewing all the circumstances collectively, a clear case of negligence was made out against the defendant company.

In the case of Sale v. New York Central and Hudson River R. R. Co., 76 N. Y. 594, the accident was occasioned by the striking of the wheel of plaintiff's carriage against a misplaced rail on the road of the defendant at a crossing, and the same doctrine was announced.

To the same effect is Tash v. Third Avenue R. R. Co., 1 Daly, 148, where in consequence of the sinking of the pavement a spike used to secure a rail projected an improper distance, and plaintiff's carriage striking upon the same was overturned.

Not only must the track and rail be kept in good condition, but the roadbed must also be maintained so as to present no holes nor inequalities of surface whereby travellers may be injured. Where, therefore, plaintiff's horse in travelling on defendant company's track, stepped into a hole and so injured himself as to become unserviceable, the company was held liable. Worster v. Forty-second Street and Grand Street Ferry Co., 50 N. Y. 203.

And where the plaintiff's son, who was running with a fire-engine upon a street of a city wherein a railroad track was laid, stepped into a similar hole situate on the road-bed of the railway, the company was held liable. Oakland Ry. Co. v. Fielding, 48 Pa. St. 320. See also Masterton v. N. Y., etc., R. R. Co., 3 Am. and Eng. R. R. Cas. 408.

Where a railroad company construct a culvert between its tracks they are bound to keep the same properly covered, and for a failure to do this will be held liable. Judson v. New York Central and Hudson River R. R. Co., 29 Conn. 434. See also upon this point Veazie v. Penobscot Ry. Co., 49 Me. 119.

A railroad company is also bound, as far as its employees are concerned, to keep its road-bed in reasonably safe condition, and if it fails to do so will be liable to a servant who is injured in consequence while in the discharge of his ordinary duty. Snow v. Housatonic Ry. Co., 8 Allen, 441. If, however, the servant knows of the existence of the defect and continues his work without out objection, he cannot recover in case of an injury. Smith v. St. Louis, Kansas City and Northern Ry. Co., 69 Mo. 32. In this case a brakeman was injured by catching his foot in the guard of a certain switch, the form of which was not quite so safe as that of the switches employed on other roads. The plaintiff, however, was shown to have had a full knowledge of the kind of switch in use, and to have been long accustomed without objection to the use of it. He was accordingly held not to be entitled to recover.

Where a railroad company at a crossing inside the limits of a city piled up dirt by license of the city, but left it there at night without a lantern to mark the spot contrary to the city ordinance, it was held liable for an accident happening in consequence to a person driving that night over the pile. Lyon v. St. Louis, Iron Mt. and S. R. R. Co., 6 Mo. App. 518.

A town or city which is by law bound to keep the highway safe and convenient for public travel is not relieved of the duty by the fact that the defects or obstructions were caused by a railway company, where it has the power to remove them; but it remains liable to travellers who suffer injury from such defects and obstructions, even though the injured person has also a right of action against the company. Johnson v. Salem, T. and C. B. Co., 109 Mass. 522; Hawks v. Northampton, 116 Mass. 420; Wellcome v. Leeds, 51 Me. 313; People v. Brooklyn, 65 N. Y. 349; Wilson v. Watertown, 3 Hun, 508; Norristown v. Mayer, 67 Pa. St. 355; Philadelphia v. Weller, 4 Brewster, 24; Hamden v. New Haven and N. Co., 27 Conn. 158; Lee v. Barkhampstead, 46 Conn. 213; Swenson v. Lexington, 69 Mo. 157; Watson v. Tripp, 11 R. I. 98.

If, however, as is sometimes the case, the nature of the defect or obstruction be such that it is impossible for the town to remedy or remove it, it will not be liable. Jones v. Waltham, 4 Cush. 299; Young v. Yarmouth, 9 Gray, 386; Davis v. Leominster, 1 Allen, 182.

The condition of a railroad crossing very shortly after an accident is evidence as to what its condition was at the time of an accident, provided there be no pretence that said condition had been altered in the mean time. Milwaukee and Chicago R. R. Co. v. Hunter, 11 Wis. 160.

MICHIGAN CENTRAL R. R. CO.

v.

HENDRYX HASSENMEYER.

(Advance Case, Michigan. Supreme Court, March Term, 1882.)

The question of negligence, where there is any evidence fairly tending to prove it, is for the jury.

Decedent was seen about to cross a railway track in a village, at a time when a train was approaching from one direction, and one backing towards her from the other direction. She was soon after found dead outside the street limits on railroad grounds, having been run over by the backing train. *Held*, that her being found where she was, outside the street limits, did not of itself make out against her a case of contributory negligence.

In judging of negligence all the circumstances are to be taken into the account, and among others the age and sex of the person injured so far as these are important.

But it cannot be laid down as a rule of law that a less degree of care is required in a woman than in a man; and an instruction to that effect is erroneous. The rule of reasonable care and prudence knows nothing of sex.

Edwards & Stewart and G. V. N. Lothrop, for the plaintiff in error: The act of deceased venturing upon the railroad track, over which a backing train, plainly within her sight, was approaching, was contributory negligence as matter of law. Lake Shore and Mich. Southern R. R. Co. *v.* Miller, 25 Mich. 274; Mich. Cent. R. R. Co. *v.* Campan, 35 Mich. 468; Detroit and Milwaukee R. R. Co. *v.* Steinberg, 17 Mich. 99. The deceased, although a minor, was of sufficient intelligence and judgment to avoid danger, and had attained to years of discretion. Such minors are responsible for their failure to use the ordinary degree of care. Sherman and Redfield on Negligence, § 50; McMahon *v.* Mayor of New York, 33 N. Y. 645; Ewen *v.* Chicago and North-western R. R. Co., 38 Wis. 613. The degree of care required of such persons is such as prudent persons would exercise under like circumstances. The instruction to the jury, implying that the fact that she was a woman was to be considered in estimating the degree of care required, was erroneous.

O. W. Powers, for defendant in error: The case was a proper one for the jury. Marcott *v.* Marg., Hought. and Ont. R. R. Co., Mich. Sup. Ct. Oct. Term, 1881; Beatty *v.* Gilmore, 4 Harris, 463; Pa. Canal Co. *v.* Beatty, 16 P. F. Smith, 30; McGovern *v.* N. Y. Cen. and H. R. R. Co., 67 N. Y. 421; Dublin, Wicklow & Welford Ry. Co. *v.* Slattery, 39 L. T. Rep. (N. S.) 255; McWilliams *v.* Detroit Cen. Mills Co., 31 Mich. 274. The same degree

of care is not required of a child as of an adult. Daniels *v.* Clegg, 28 Mich. 40, 41; Chicago and N. W. R. R. Co. *v.* Bayfield, 37 id. 212; Swoboda *v.* Ward, 40 Mich. 425.

COOLEY J.—The plaintiff in error was sued by the administrators of Louisa Hassenmeyer, to recover damages for the negligence of its agents and servants, whereby her death was caused. The case comes upon alleged errors in the admission and rejection of evidence, and in instructions given and refused.

The decedent was killed at the crossing of the railroad with Burdick Street, one of the principal streets in the village of Kalamazoo, on the 20th day of December, 1878. She was a girl thirteen years of age, and was proceeding along the street with a small pail of milk in her hands. The morning was somewhat cold and stormy. As she approached the railroad track a train was passing in one direction, and its bell was being rung. From the other direction an engine was backing up several cars, and its bell was also being rung. It was by this train that the girl was struck and killed. There was a flagman at the crossing, and no negligence seems attributable to him. The brakeman on the backing train was upon the ground, walking along by its side to guard against accidents, but did not notice the girl until she had been thrown to the ground and killed. No one saw the girl when she was struck, and the place where she was lying when first seen was outside the limits of the street.

It was contended for the defence that there was no evidence of negligence on the part of the railroad agents and servants, and therefore nothing to go to the jury. It was also insisted that a clear case of negligence on the part of the deceased appeared, and that upon this ground, if not upon the other, the court should have instructed the jury to return a verdict for the defendant. We do not agree that the case was so plain on either ground as to justify the court in taking it from the jury. It may be that if we were at liberty to pass upon the facts we should reach the conclusion which the defence insist upon as the only conclusion that is admissible; but we cannot say that the case is too plain upon the facts for fair minds to differ upon, and following our former decisions we agree with the trial court that the facts were properly left to the jury. Detroit, etc., R. R. Co. *v.* Van Steinberg, 17 Mich. 99; Lake Shore, etc., R. R. Co. *v.* Miller, 25 Mich. 274, 295; Le Baron *v.* Joslin, 41 Mich. 313.

Upon a supposition that the jury might find that the decedent at the time she was struck and killed, was outside the limits of the highway and upon lands belonging to the railroad company, the defence requested rulings in effect that if such was the fact the decedent was in law chargeable with negligence. We do not agree that this was necessarily the case. The fact might have an important bearing, or it might not; depending on how far she was out-

side the street lines, and why she was there, and whether she was aware of the fact. As the street was without fences and cattle guards at this point, it would be unreasonable to hold that at her peril she must keep herself strictly within its lines; and if no intent to leave the highway was apparent, and she was not further outside than one might inadvertently go in passing along the street and looking both ways for coming and passing trains, the fact should neither absolve the employees of the railroad company from the observation of care to prevent injury, nor charge her with fault if otherwise sufficiently vigilant.

Counsel for the plaintiff in error has been industrious in the discovery of faults in the rulings of the circuit judge, but for the most part his criticisms are too particular and technical to be accepted, or to require discussion at our hands. With a single exception we think no error was committed to the prejudice of the party now complaining.

The exception is found in the instruction to the jury respecting the degree of care required of the decedent to avoid the dangers to which she fell a victim. It was contended for the plaintiff below that the law did not require the same degree of care of a child as of an adult person, and the court so instructed the jury. This was unquestionably correct. Ry. Co. *v.* Bohn, 27 Mich. 503. But it was also insisted that the law did not expect or require the same degree of care and prudence in a woman as in a man; and the court gave this instruction also. It is presumable, therefore, that the jury, in considering whether the decedent was chargeable with contributory negligence, made not only all proper allowances on account of her immature years, but further allowance also on account of sex.

No doubt the difference in sex has much to do with the application of legal principles in many cases. But regulations with the utmost propriety sometimes make distinctions between men and women in the conduct required of them under the same circumstances, and the unwritten law is in some particulars more indulgent to the one sex than to the other. Words and conduct which in the presence of men might be condemned for bad taste only, in the presence of women may be punishable as criminal indecency, and a crime of violence committed upon the one would be condemned less severely by public opinion and punished less severely by the law than the same crime committed upon the other. And no doubt also the law ought under all circumstances where they become important, to make allowances for any differences existing by nature between men and women, and also for any that grow out of their different occupations, modes of life, education and experience. A woman, for example, driving a horse on a highway, may be presumed somewhat wanting in the "amount of knowledge, skill, dexterity, steadiness of nerve, or coolness of judgment—in

short, the same degree of competency" which we may presume in a man; and the person meeting her under circumstances threatening collision should govern his own conduct with some regard to her probable deficiencies. Daniel *v.* Clegg, 28 Mich. 33, 42. In Snow *v.* Provincetown, 120 Mass. 580, a question of contributory negligence was made against a young woman who, in attempting to pass a cart in a public way, which had commenced backing towards her, accidently fell over an embankment and was injured. The following instruction by the trial judge, to indicate the degree of care required of the plaintiff, was held unexceptionable: "Care implies attention and caution, and ordinary care is such a degree of attention and caution as a person of ordinary prudence of the plaintiff's sex and age would commonly and might reasonably be expected to exercise under like circumstances." This no doubt is true.

But while the authorities permit all the circumstances to be taken into the account, age and sex among the rest, in determining the degree of care to be reasonably required or looked for, no case, so far as we know, has ever laid it down as a rule of law, that less care is required of a woman than of a man. Sex is certainly no excuse for negligence; Fox *v.* Glastenbury, 29 Conn. 204; and if we judge of ordinary care by the standard of what is commonly looked for and expected, we should probably agree that a woman would be likely to be more prudent, careful and particular in many positions and in the performance of many duties than a man would. She would, for example, be more vigilant and indefatigable in her care of a helpless child; she would be more cautious to avoid unknown dangers; she would be more particular to keep within the limits of absolute safety when the dangers which threatened were such as only great strength and courage could venture to encounter.

Of a given number of persons travelling by cars, several men will expose themselves to danger by jumping from the cars when they are in motion, or by standing upon the platform, where one woman would do the same; and a man driving a team would be more likely to cross in front of an advancing train than a woman would. In many such cases a woman's natural timidity and inexperience with dangers inclines her to be more cautious; and if we naturally and reasonably look for greater caution in the woman than in the man, any rule of law that demands less must be unphilosophical and unreasonable. Suppose, for instance, that a man and woman standing together upon the platform of a moving car are accidentally thrown off and injured, could any rule of law be justified which would permit a jury to award damages to her but not to him, upon the ground that the law expected and required of him the higher degree of care? Or may the woman venture upon an unsafe bridge from which the man recoils render the protection of such a discrimination? Or trust herself to a fractious horse,

expecting if she shall chance to be injured that the tenderness of the law will excuse her with a verdict of such care as was reasonably to be expected when it would pronounce a man foolhardy? We think not.

No person of any age or sex is chargeable with legal fault, who, when placed in a position of peril, does the best that can be done under the circumstances. Voak *v.* Nor. Cent. R. R. Co., 75 N. Y. 320. Even this statement indicates a more rigid rule than the law will justify, for the legal requirement is only the observance of ordinary care; and while in laying down rules that are of general application, it is no doubt better to employ general terms, lest they be supposed applicable to particular classes only. Tucker *v.* Henniker, 41 N. H. 317. Yet when the actor is a woman an instruction that she is bound to observe the conduct of a woman of common and ordinary prudence, cannot be held legally erroneous because of being thus special. Bloomington *v.* Perdue, 99 Ill. 329.

Women may enter upon and follow any of the avocations of life; they may be surgeons if they will, but they cannot as such claim any privilege of exemption from the care and caution required of men. A woman may be engineer of a locomotive if she can obtain the employment, but the law will expect and require of her the same diligence to avoid mischief to others which men must observe. The rule of prudent regard for the rights of others knows nothing of sex. Neither can sex excuse any one for the want of ordinary care when exposing one's self to known and obvious perils.

If it was apparent that the error of the judge did not mislead in this case, we might affirm the judgment. But that fact is not apparent. No one witnessed the accident; the question of due care is involved in doubt, and the erroneous ruling may have been controlling. It follows that there must be a new trial.

The law is bound to exact only that degree of care which can reasonably be presumed of the age and intelligence of the child. Greater care must be exercised towards a child than towards an adult, and what would be ordinary neglect as towards a person of full age and capacity would be gross neglect as to a child or one incapable of escaping danger. If the child from its age and experience be found to have capacity and discretion to observe and avoid danger, it should be held responsible for the exercise of such maturity and capacity as it possesses. R. R. Co. *v.* Stout, 17 Wall. 687; Kansas City R. R. Co. *v.* Fitzsimmons, 22 Kan. 686; Birge *v.* Gardiner, 19 Conn. 517; Daley *v.* Norwich and W. R. Co., 26 id. 591; Brennan *v.* Southbury, 37 id. 199; Brennan *v.* Fairhaven R. R. Co., 45 id. 284; Robinson *v.* Cone, 22 Vt. 213; Bell. R. R. Co. *v.* Snyder, 18 Ohio St. 399; C., B. and Q. R. R. Co., *v.* Dewey, 26 Ill. 255; Kerr *v.* Forgue, 54 id. 482; Chicago R. R. Co. *v.* Murray, 71 id. 601; Rockford *v.* St. Louis R. R. Co., 82 Ill. 198; Chicago R. R. Co. *v.* Becker, 84 Ill. 483; Rockford R. R. Co. *v.* Delaney, 87 Ill. 198; McMillan *v.* Burleigh, 46 Iowa, 198; Lafayette R. R. Co. *v.* Huffman, 28 Ind. 287; St. Louis R. R. Co. *v.* Valirius, 56 id. 511; Ewen *v.* Chicago and N. W. R. R. Co., 38 Wis. 613; Haas *v.* Chicago R. R. Co., 41 id. 44; East Sag. R. R. Co. *v.* Bohn,

27 Mich. 503; C. and N.W. R.R. Co. v. Bayfield, 37 id. 212; Daniels v. Clegg, 28 id. 40; Swowoba v. Ward, 40 id. 425; Gov't St. R. R. Co. v. Hanlon, 53 Ala. 70; Balt. R. R. Co. v. Brenig, 25 Md. 378; Same v. McDonnell, 43 id. 534; Balt. R. R. v. State, 30 id. 47; Costello v. Syracuse R. R. Co., 65 Barb. 92; Bullock v. Babcock, 3 Wend. 394; O'Mara v. H. R. R. R. Co., 38 N. Y. 445; Cosgrove v. Ogden, 49 N. Y. 255; Reynolds v. N. Y. C. R. R. Co., 58 id. 249; Thurber v. Harlem Bridge Co., 60 id. 326; McGarry v. Loomis, 63 id. 107; S C., 20 Amer. Rep. 510; McGovern v. N. Y. C. R. R. Co., 67 N. Y. 421 Casey v. N. Y. C. R. R. Co., 78 id. 518; Byrne v. N. Y. C. R. R. Co., 83 id. 620; Pa. R. R. Co. v. Kelley, 31 Pa. St. 76; Phila. and Reading R. R. Co. v. Spearen R. R. Co., 67 id. 300; Oakland R. R. Co. v. Fielding, 48 id. 320; Smith v. O'Connor, 48 id. 218; North Cen. R. R. Co. v. Mahoney, 57 id. 187; Kay v. Pa. Cen. R. R. Co., 65 id. 269; R. R. Co. v. Caldwell, 74 id. 421; Same v. Hazard, 75 id. 367; Same v. Lewis, 79 id. 33; Hestonville Pas. R. R. Co. v. Connell, 88 id. 520; Warner v. R. R. Co., 6 Phil. 537; Boland v. Missouri R. R. Co., 36 Mo. 484; O'Flaherty v. Union R. R. Co., 48 id. 70; Isabell v. Han. and St. J. R. R. Co., 60 id. 475; Donoho v. Vulcan Iron Works, 7 Mo. App. 447; Munn v. Reed, 4 Allen, 431; Lynch v. Smith, 104 Mass. 188; Elkins v. Boston and Albany R. R. Co., 115 id. 190; Dowd v. Chicopee, 116 id. 589; Cahill v. Eastman, 18 Minn. 324; Keff v. Mil. and St. Paul R. R. Co., 21 id. 207; Shierbolf v. North Branch R. R. Co., 40 Cal. 447.

As stated in the principal case there appears to be no rule of law which requires less care of a woman than of a man. The few cases in which such a claim has been made are cited in the opinion of Cooley, J. In Tucker v. Henniker, 41 N.H. 317, which was an action for damages to plaintiff, a woman, from alleged defects in a highway, the court says: "In a country where women are accustomed, as among us, to drive horses and carriages, there can be no doubt that the degree of care, skill and prudence required of a woman in managing her horse would be precisely that degree of care, skill and prudence which persons of common prudence or mankind in general will exercise, or are accustomed to exert in the management of horses driven by them. Now the language of the charge in the court below might be construed in making the average care, skill and prudence of women in managing horses, instead of the average care, skill and prudence of mankind generally, including all those accustomed to manage horses, whether men or women, boys or girls, the standard by which to determine whether or not the plaintiff had been guilty of any unskilfulness or want of care in the management of her horse at the time of the accident; and it may be doubtful whether this average would be higher or lower than that of mankind in general, and the jury may possibly have been misled by it. The instruction must be held to be erroneous on this point." While in Bloomington v. Purdue, 99 Ill. 329, it was held that instructions which do not refer as a standard of caution to what ordinary young ladies would do, but to the conduct of an ordinarily prudent person or a woman of common and ordinary prudence, were not faulty in respect to the standard required. While there are few cases in the reports in which sex has been urged as an excuse for negligence, and while in these cases such a rule of law has not been admitted, there are many cases where women have been held to the ordinary rules of negligence requiring the exercise of such a degree of attention and caution as a person of common prudence would be expected to exercise, the question of sex, like that of age, being only a circumstance to be considered in determining the degree of care to be reasonably expected. Fox v. Glastonbury, 29 Conn. 204; Voax v. Nor. Cen. R. R. Co., 75 N. Y. 320; Snow v. Provincetown, 120 Mass. 585; Daniels v. Clegg, 28 Mich. 33; Lake Shore R. R. Co. v. Miller, 25 Mich. 274.

In the case of an injury from a defective sidewalk, where the plaintiff was a woman, it was held that the city was not liable, where the most ordinary care on her part would have prevented the accident. Chicago v. McCarty, 75

Ill. 602. See also Rock Island v. Vanlandschoot, 78 Ill. 485; Chicago v. McGiven, 78 id. 347; I. and St. L. R. R. Co. v. Evans, 88 id. 63; City of Wyandotte v. White, 13 Kan. 191, where it was held not erroneous to instruct that plaintiff's right to recover was not affected by her having contributed to the injury, unless she was at fault in so doing. In an action to recover for personal damages, where the plaintiff, a widow 70 years of age, in excellent health, was injured in getting off a train after it had started, it was held that this fact showed an absence of due care. If the facts are undisputed and fail to show that plaintiff was in the exercise of due and reasonable care at the time of receiving the injuries, it is the duty of the court to instruct the jury that she cannot recover. Garett v. Manch. and Lawrence R. R. Co., 16 Gray, 504. So also Lucas v. New Bedford R. R. Co., 6 Gray, 64, where it was held that the plaintiff, a woman, might have avoided the consequences of defendant's negligence. A woman who voluntarily attempts to pass over a dangerous sidewalk, and which she knows to be such by reason of ice upon it, cannot maintain an action against the town to recover damages for injuries from a fall. Wilson v. Charlestown, 8 Allen, 137. In Boner v. Dubuque St. Ry. Co., 53 Iowa, 278, where the plaintiff, a woman, fell in alighting from a hack, it was held that she must show not only the negligence of defendant, but that she did not, by want of ordinary care, contribute to the injury. Where the plaintiff, a woman, was injured at a street crossing by the driver of a cart, her omission to exercise reasonable care would bar an action for damages. Baker v. Savage, 42 N. Y. 193. The failure of an engineer to ring the bell at a crossing did not relieve plaintiff, a woman, about to cross the walk, from the necessity of taking ordinary precautions, and a failure to do so, or after having done so, an attempt to cross was culpable negligence. R. R. Co. v. Houston, 95 U. S. 697. In the case of an injury to a woman from a defective sidewalk an instruction that she must have exercised such care as was to be expected from persons of ordinary prudence was held to be correct. Hill v. Seekonk, 119 Mass. 85; Woods v. Boston, 121 Mass. 337; Boston v. Springfield, 110 Mass. 131. See French v. Taunton Branch R. R. Co., 116 Mass. 537, where the plaintiff was injured at a railroad crossing and the question whether she was in the exercise of due care was held to be a proper one for the jury to determine. See also Brown v. H. and St. J. R. R. Co., 50 Mo. 461; Lafayette and Ind. R. R. Co. v. Adams, 26 Ind. 76, where the plaintiff, a girl of fifteen years, was stopped at a crossing to await the passage of a train and then stepping forward was struck by another train and was injured, the case was held a proper one to be submitted to the jury to determine whether she had failed to exercise ordinary care or had been guilty of negligence. Casey v. N. Y. C. and H. R. R. R. Co., 78 N. Y. 523. A very similar case was Haycroft v. L. S. and Mich. South. R. R. Co., 64 N. Y. 636. See also Moody v. Osgood, 60 Barb. 644, where the plaintiff, a woman, was injured by being struck by defendant's sleigh; Murphy v. Dean, 101 Mass. 455, which was an action brought by a woman to recover damages for an injury occasioned by a heavy cask slipping from the hands of a wagoner whom, before attempting to pass, she perceived to be about to unload the cask by skids. The mere fact that the plaintiff began to cross the railroad track when her view along the track was obstructed was not conclusive that she did not use due care. Mayo v. Boston R. R. Co., 104 Mass. 137. See Hart v. H. R. Bridge Co., 84 N. Y. 56. Whether the decedent had exercised ordinary care and caution when she left the station to go to the cars, and while passing over an intervening track was struck and killed, was for the jury to decide. Terry, Adm. v. Jewett, 78 N. Y. 338. So also where plaintiff's intestate, a girl of seventeen years, got off the train and in walking across the track was struck by another train and killed. Brassel v. N. Y., etc., R. R. Co., 3 A. & E. R. Cas. 380. See Hoffman v. N. Y. C. and H. R. R. Co., 75 N. Y. 607. The absence of reasonable care was such contributory negligence as to preclude recovery (where the plaintiff's

were women). McLaury v. City of MacGregor, 54 Iowa, 717; Stiles v. Geesey, 71 Pa. St. 439. See also the following cases, where the ordinary rules governing the question of negligence were applied: Pa. Co. v. Kensil, 70 Ind. 569; Weisenberg v. Appleton, 26 Wis. 56; Sheehan v. Edgar, 58 N. Y. 631; Driscoll v. Mayor, etc., 18 N. Y. 101; Joliet v. Seward, 86 Ill. 402; Woodward v. Chi. and N. W. R. R. Co., 23 Wis. 400; Pack v. Mayor, 3 Coms. 489.

The Northern Central Ry. Co.

v.

The State of Maryland, use of William F. Burns, and others.

(64 *Maryland Reports*, 118. *June 29th*, 1880.)

An action was brought under Art. 65, of the Code, by the State against a railroad company to recover damages resulting from the death of the mother of the children for whose use the action was brought. From the evidence at the trial, it appeared that there was no one who saw the infliction of the injuries from which the deceased died, but as far as could be ascertained, there seemed to be no rational explanation of her injuries, other than contact with some portion of a passing train of the defendant, and it was not controverted by the defendant that the injuries were so caused. The only evidence on the subject of a "look-out" was that of the engineer and fireman of the train, which was uncontradicted and unimpeached. They proved that they were both engaged at the time in keeping a most careful and vigilant look-out, and neither of them saw the deceased on or near the railway. *Held:*

1st. That it could not be inferred from this fact that their testimony was not true, and might be disregarded by the jury, unless it had been shown, which was not done, that the deceased was on the track in front of the train, and was struck by the locomotive.

2d. That if she came in contact with some other part of the train, either in attempting to cross, or getting too near the track after the locomotive had passed, she would not be seen by the engineer or fireman; and their failure to see her under such circumstances, would be no ground for imputing negligence to them, as they were under no obligations to look back.

The proof was that the crossing was not dangerous, and it was not usual to give signals by ringing the bell or sounding the whistle at that place. There did not appear to be any reason why such signals should be given, unless some one should be seen on or approaching the track. The train was in sight for the distance of two hundred yards, and the deceased could have seen it, if she had looked, time enough to have crossed in safety, or to have waited till it had passed. *Held:*

1st. That it was impossible under the circumstances of the case, to ascribe the accident exclusively to the failure to give signals of the approach of the train.

2d. That before going upon the track or attempting to cross it, it was the duty of the deceased to look for an approaching train, and her failure to do so was negligence on her part.

3d. That at the time and place when the accident occurred, there was no obligation on the part of the defendant to give signals of the approach of

the train by sounding the whistle or ringing the bell, and negligence could not be imputed to it if they were not given.

4th. That it was error to submit the case to the jury, there being no evidence of negligence on the part of the defendant.

APPEAL from the Court of Common Pleas.

The case is stated in the opinion of the Court.

Exception.—At the trial the plaintiff offered the four following prayers:

1. That if the jury find from the evidence, that on or about the 7th day of June, 1878, Ella Burns was killed by the locomotive or cars of the defendant, while operated by its agents on its road, and that the equitable plaintiffs are related to her as set forth in the pleadings herein, and that said killing resulted directly from a want of ordinary care and prudence on the part of the agents of the defendant, and not from the want of ordinary care and prudence of the deceased, directly contributing to the accident, then the plaintiff is entitled to a verdict.

2. That even if the jury believed that the said Ella Burns was guilty of a want of ordinary care and prudence, in approaching and walking on the track of the defendant, under the circumstances testified to before them; yet if they further find that if the agents of the defendant had used in and about the running of the train that injured her, ordinary prudence and care in giving reasonable signals of its approach, and in keeping a reasonable lookout, that the said accident might have been prevented, then the plaintiff is entitled to recover; provided they further find the facts set out in the first prayer of the plaintiff.

3. That in considering the question of negligence, it is competent for the jury, in connection with the other facts and circumstances of the case, to infer the absence of fault on the part of the deceased, from the general and known disposition of men to take care of themselves, and keep out of the way of difficulty and danger.

4. That if under the instructions of the Court, the jury should find for the plaintiff, then, in assessing the damages, they may take into account the reasonable expectation of pecuniary advantage resulting to the equitable plaintiffs, by their mother remaining alive, and damages may be given in respect of that expectation being disappointed, and the probable pecuniary loss, past and prospective, thereby occasioned, and that these prospective damages may be estimated as to the equitable plaintiffs to the period of their majority.

The defendant offered the five following prayers:

1. That if the jury shall find from the evidence that the deceased after crossing the foot-bridge, and before getting upon the track upon which the train was approaching, had looked in the direction from which said train was coming, she could have seen

the said train, and that without looking, or with knowledge that said train was approaching near to said point, attempted to cross said track, and was struck while so doing, and that those in charge of said engine were on the lookout when approaching said point, and did not see said deceased, nor know of her presence near said track, then the plaintiff cannot recover in this case, though the jury shall find from the evidence that no whistle was blown nor any bell was rung from said engine.

2. That the plaintiff cannot recover in this action without showing that the defendant, or its agents, were guilty of negligence in the management of the train mentioned in the evidence, and that the injury to the deceased was caused by said negligence, and the burden of proof is on the plaintiff to prove such negligence, and that the death of the deceased was caused thereby; and that there is no sufficient evidence in this case from which the jury can find that the said deceased was struck by the engine of said train, or that her death was caused by the negligence of the defendant, or its agents, and therefore the verdict of the jury must be for the defendant.

3. That if the jury find from the evidence, that the deceased, while attempting to cross the railway tracks of the defendant, was killed by the contact with the cars or engine of said train mentioned in the evidence, and that after crossing the foot-bridge, mentioned in the evidence, and before getting upon either of the tracks of said railway, as well as from each of said tracks, and from the space between them, there was a clear view of said track in the direction in which said train was coming for two hundred yards or more, and that the deceased, if she had looked, would have seen the said train approaching in time to keep out of its way, and that she, either without looking or with knowledge that said train was approaching said point, attempted to cross said track, and was struck in so doing; and shall further find that neither the fireman nor engineer of said train, were aware of her presence on or near said tracks, and that they were keeping a lookout for persons on or near said tracks, as they approached the said point, and that the tracks and the approach from said foot-bridge, were in full view of the said fireman for two hundred yards, and to the engineer for one hundred, before they reached said point, and said train could have been stopped within the shorter of said distances, then the plaintiff cannot recover in this action, although the jury shall find from the evidence that no whistle was blown, nor any bell was rung on said engine.

4. That if the jury shall find from the evidence, that the deceased was not struck by the engine of the train mentioned in the evidence, but by some one or other of the cars in the rear of said engine, then, under the evidence in this case, there is nothing to

show that her being so struck was caused by any negligence of the defendant or its agents, and the plaintiff cannot recover.

5. That if the jury shall find from the evidence, that if the deceased, Ella Burns, after crossing the foot-bridge, and before getting upon either of the railroad tracks, had looked in the direction from which said train was coming, she could have seen the said train in time to keep out of its way, and that without looking, or with knowledge that said train was approaching near to said point, she attempted to cross the said track, on which said train was approaching, in front of the same, and was struck while so doing, then the plaintiff cannot recover in this action, there being no evidence how near the said train was to her when she attempted so to cross, and no evidence that the said train could, by the exercise of reasonable care and diligence, after she so attempted to cross, have been stopped before striking her.

The Court (BROWN, J.) rejected the prayers on both sides, and gave the following instructions of its own:

The Court instructs the jury, that if they find from the evidence, that on or about the 7th day of June, 1878, Ella Burns was killed by a train of defendant, consisting of a locomotive and cars, while operated by its agents, on its road, and that the equitable plaintiffs are related to her as set forth in the declaration in this case, then the plaintiff is entitled to a verdict, even if the jury believe that the said Ella Burns was guilty of a want of ordinary care and prudence in being in front of said train when it struck her, or in being so near it that it struck her in passing; provided the jury shall also find that if the agents in charge of the train had used ordinary care and prudence in giving reasonable signals of its approach, and in keeping a reasonable lookout, the said accident would not have occurred.

But the Court also instructs the jury, that if they find that Ella Burns directly contributed to the accident by going on the track of the defendant in front of said train, or by going against said train, as it passed so suddenly that the agent in charge thereof could not have avoided the accident by reasonable care and prudence, then the plaintiff is not entitled to recover.

If, under the instructions of the Court, the jury should find for the plaintiff, then in assessing the damages, they may take into account the reasonable expectation of pecuniary advantage resulting to the equitable plaintiffs by their mother remaining alive, and damages may be given in respect of that expectation being disappointed, and the probable pecuniary loss, past and prospective, thereby occasioned, and that these prospective damages may be estimated as to the equitable plaintiffs to the period of their majority.

The defendant excepted, and the verdict and judgment being against it, appealed.

The cause was argued before BARTOL, C. J., MILLER, ALVEY and IRVING, J.

Bernard Carter, for the appellant.

B. Howard Haman and Edgar H. Gans, for the appellee.

BARTOL, C. J.—This suit was instituted by the appellee, under the 65th Article of the Code (Act of 1852, ch. 299), for the use of the infant children of Mrs. Ella Burns, to recover damages arising from her death, which happened on the Northern Central Railway, and was caused as stated in the declaration, by the alleged wrongful act, neglect, and default of the appellant's agents, while she was lawfully walking on the railroad track of the appellant. The right of action in such case exists according to the express terms of the Code, only where the party injured (if death had not ensued) would have been entitled to maintain the action. This is the test prescribed by the statute, that is to say, "it is incumbent on the plaintiff to prove that the death of Mrs. Burns was caused entirely by the negligence or default of defendant's agents, and it must not appear from the evidence that want of ordinary care and prudence on the part of the deceased, directly contributed to cause her death." Foy's Case, 47 Md. 76; Lewis' Case, 38 Md. 599.

With this principle in view, we proceed to state briefly the facts of the case, as shown by the testimony, and to consider the ruling of the Court below upon the prayers, and its instructions to the jury set out in the bill of exceptions.

As correctly stated in appellant's brief "there is no direct evidence that the deceased was struck by any of the engines or cars of the company, as there was no one who saw the infliction of the injuries from which she died. She was found lying wounded between the two tracks close to the track over which a train had just passed on its way to Baltimore, and as far as could be ascertained, there seemed to be no rational explanation of her injuries other than contact with some portion of the train of appellant, and therefore the appellant did not controvert in the Court below, or in this Court, that the injuries were so caused."

The accident occurred on the 7th day of June, 1878, a little after eight o'clock in the morning, the train by which she was believed to have been struck having left Woodberry station, about a quarter of a mile distant, at seven minutes past eight, Philadelphia time. As shown by the map produced in evidence, and explained by the witnessess, the railway consists of two tracks a few feet apart, running alongside of, and parallel to Jones' Falls, on the southwestern side of the staeam. A train going toward Baltimore has the stream on the left, and on the right is a public park, with a gate through which pedestrians sometimes pass going into the park, or on their way to and from Baltimore. Across the stream is a footbridge, the end of which is on the land of the company about ten yards from the railway and about twenty-five yards north-east from

the park gate in a diagonal direction. Many persons going to Baltimore and back cross the railway between the bridge and park gate, but there is no public road or way there, nor any planks for convenience of crossing. As stated by plaintiff's witnesses, persons going from the bridge to the park gate after crossing the bridge sometimes continue on the side next the stream till opposite the gate and cross directly over the railway, sometimes they cross the railway immediately after leaving the bridge and walk to the gate, there being a foot-path on each side of the railway; and sometimes they cross diagonally from the bridge to the gate. There is no testimony showing at what point or in what manner deceased got upon the railway.

The witness Wartman saw her on the road leading from Woodberry towards the bridge on the east side of the falls—she was walking quite fast and seemed to be in a hurry; a few minutes after her, the witness Wilhelm passed along in the same direction; when he had crossed the bridge, he heard some one groaning and saw Mrs. Burns lying between the tracks of the railway waving her hand. The spot where she lay, as stated by the witnesses, was about twenty yards from the bridge in a diagonal direction, and three or four yards from the park gate. She was lying near the south or west track with her head towards it. As stated by Dr. Williams, one of plaintiff's witnesses, "her shawl had fallen to her waist and her dress was not torn at all, and seemed very little deranged, it was just as it were wrapped about her person, it looked as if she might have been pushed aside; she was dying, and expired in a short time." Wilhelm states that before crossing the bridge, and when about one hundred and fifty yards from it, he saw a train of cars going towards Baltimore on the west or south track; it was then a short distance beyond the place where he afterwards saw deceased lying. It is probable she was struck by that train. The place where the accident happened is in the open country. South of Woodberry there is a curve in the road, and there were three trees on the west side of the falls, near the foot-bridge; but these did not obstruct the view; according to all the testimony there was a clear unobstructed view of the railway for the distance of two hundred yards; for that distance an approaching train could be seen from the end of the bridge, or from any point between it and the railway, or on the railway.

On the east side of the Falls nearly opposite the park gate is a large cotton mill which was then in operation, the noise of which and of the water, according to the testimony of some of the witnesses, drowned the noise of an approaching train, and prevented a person from hearing it.

On leaving Woodberry the bell on the train was rung, but no bell was rung or whistle sounded as it approached the place of the accident. The evidence is that it was not customary to give any

such signals at that place, unless some one was seen on, or approaching the railway. The only evidence in the case as to a lookout upon the train, is that of the engineer and fireman, who testified that from the time they left Woodberry, they were in the cab, the engineer on the west and the fireman on the east side, each having his head out of the window carefully looking out. This vigilance continued till they reached a culvert below the park gate, about fifty yards beyond the foot-bridge, where they shut off the steam on approaching Mt. Vernon. They explained that they always run slowly and carefully, and keep a sharp lookout on this part of the road, it being their duty to do so, for the reason that at Mt. Vernon there are switches connecting with the freight yards, where the freight trains of the company are made up, and they are liable to have flagmen on the tracks signalling them that the freight trains are in the way near the Mt. Vernon freight yards. Neither the engineer nor the fireman saw the deceased, nor did they know any thing of the accident till they heard of it, after the train had reached Baltimore.

There was no blood on the locomotive, nor any marks of the collision. The wounds on the person of the deceased, as testified by Dr. Williams, were a cut on the left side of the head, beginning on the left and extending towards the right side, a cut over her right eye, and her left shoulder seemed to be broken, as her left arm seemed to be useless. Her knees were skinned and her hands scratched. There was some blood on the ballast, and on the cross-tie where she was lying between the tracks, but none between the rails on the west track on which the train was running, nor any on the rails themselves.

Mrs. Burns was thirty-six years of age, in good health, and in full possession of her faculties.

The train consisted of a locomotive and eight cars; besides the conductor, engineer, and fireman, there were upon it a baggage-master and two brakemen, and it was furnished with Westerhouse air-brakes, and was running eleven miles an hour.

These are the facts of the case as shown by the testimony.

The defence rests on two propositions: 1st. That there is no evidence legally sufficient to be submitted to the jury to prove negligence on the part of defendant's agents causing the death of Mrs. Burns, and 2d. That her death was the direct consequence of a want of ordinary care on her part.

Five prayers were offered by the defendant asking for instructions on these points; these were rejected, and instructions were given to the jury submitting to them the questions of negligence on the part of defendant's agents, and of contributory negligence on the part of the deceased.

This ruling is presented for review on this appeal.

We have not met with any reported case, in which the evidence

relied on to charge a railroad company for the consequences of an accident to a stranger, is so meagre and insufficient as in the present; either for the purpose of proving negligence on the part of the company, or of exonerating the unfortunate subject of the accident from gross and inexcusable carelessness directly causing her death.

As said in Frech's Case, 39 Md. 576, "Before any question of contributory negligence by the deceased, becomes of importance in the case, evidence must be furnished of the culpable negligence of the defendant. And the first inquiry, therefore, is whether there be any such evidence furnished by the plaintiff as entitled him to have the case submitted to the jury."

On this question the preliminary statement of the facts of the case leaves very little room for argument or comment. A recurrence to them suffices in our judgment to absolve the defendant from the charge of negligence, and demonstrates the total absence of proof to support such a charge. The only particulars in which negligence is sought to be imputed to the company, and which are referred to in the court's instruction, are 1st. A failure to keep a reasonable "look out" on the train, and 2d. A failure to give reasonable signals of its approach by ringing the bell or sounding the whistle.

As to the first, there is no testimony in the case of any failure or omission in this respect. The only evidence on the subject is that of the engineer and fireman, which is uncontradicted and unimpeached. They prove that they were both engaged at the time in keeping a most careful and vigilant look out. They neither of them saw Mrs. Burns on or near the railway, and from this fact it is sought to be inferred that their testimony is not true, and might be disregarded by the jury. This suggestion might be entitled to some weight if it had been proved that the unfortunate lady was on the track in front of the train, and had been struck by the locomotive; for if that had been shown, they could not have failed to see her if they had been looking out as they state. But in this particular the plaintiff's evidence fails. From all that appears, she may have come in contact with some other part of the train, either in attempting to cross or getting too near the track after the locomotive had passed. In which case she would not be seen by the engineer or fireman, but their failure to see her under such circumstances would be no ground for imputing negligence to them. They were under no obligation to look back. One of the hypotheses stated in the court's instruction is that Mrs. Burns was struck not by the locomotive, but by some other part of the train. If that were so, it is clear the defendant would not be responsible for her death. 2d. As to the failure to give signals by ringing the bell or sounding the whistle. The proof is that it was not usual to give any such signals at that place; Mrs. Burns had there-

[illegible] to [illegible] to expect them; nor does there appear to be any reason why such signals should be given, unless some one should be seen on or approaching the track. It is impossible for the plaintiff under the circumstances of this case, to ascribe the accident exclusively to the failure to give signals of the approach of the train. It was in sight for the distance of two hundred yards; there was no obstruction to her view, she could have seen it if she had looked, time enough to have crossed in safety, or to have waited till it had passed. Before going upon the track or attempting to cross it it was her duty to look for an approaching train, and her failure to do so was negligence on her part. As said by Channell, B., in Snokey v. The London and N. W. Ry. Co., Law Rep. 1 Exch. 13 [cited in Foy's Case, 47 Md. 86], "Passengers crossing the rails are bound to exercise ordinary and reasonable care for their own safety, and to look this way and that to see if danger is to be apprehended." We refer also to other cases cited in Foy's Case, and to the R. R. Co. v. Houston, 95 U. S. (5 Otto) 702. In this case it was said "the failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employees in these particulars was no excuse for the negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses she could not have failed both to hear and see the train that was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If using them, she saw the train coming, and yet undertook to cross the track instead of waiting for the train to pass, and was injured, the consequence of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind."

In that case the accident occurred in a village, where it was the conceded duty of the persons in charge of the train, to give signals of its approach by sounding the whistle or ringing the bell; and yet their omission in this respect, it was held, did not render the defendant responsible in a case where the deceased by the omission of ordinary and reasonable precautions contributed to cause the accident.

In this case, at the time and place where the accident occurred, there was no obligation on the part of the company to give the signals spoken of, and negligence cannot be imputed to the defendant if they were not given. In Skelton's Case, L. R., 2 C. B., 631, (cited in Foy's Case, 47 Md.) it was properly said, "There

are many cases in which a railway company is bound to take additional precautions, on account of special dangers. . . . For example, where a sharp corner or any other cause prevents persons from being able to avoid the danger of approaching trains by due care. Bilbec *v.* L. & B. Ry., 18 C. B., (N. S.) 584, (114 E. C. L.) So where the night is dark, or smoke from neighboring works prevents persons crossing the line from seeing any engine coming, they should be warned by lights or whistling." James *v.* G. W. Ry., cited in note L. R., 2 C. P. 634; 36 C. P. 255.

As was said in Skelton's Case, so we say in this, there was nothing to oblige the "defendant to take extra precaution." The crossing was not dangerous; in daylight with the approaching train in full view, there was no need of signals; and nothing but the merest speculation and conjecture could induce the jury to believe that the accident was caused entirely by the want of signals of the approach of the train, or that it would have been avoided if they had been given.

It follows from what we have said, that it was error to submit the case to the jury, there being no evidence of negligence on the part of the defendant. And as there was no ground for a recovery by the plaintiff, the second prayer of the defendant ought to have been granted.

It is not necessary to advert to the particular objections urged by the appellant to the Court's instruction; it being in our opinion, error to submit the case to the jury at all upon the undisputed facts disclosed by the proof. Nor do we consider it necessary to notice the other prayers of the defendant, which place the defence upon the evidence of contributory negligence on the part of the deceased.

In our judgment the plaintiff has failed to offer any evidence whatever of negligence on the part of defendant's agents in charge of the train, whereby the accident was caused. The judgment must therefore be reversed, and no new trial will be ordered.

Judgment reversed.

See note, p. 123.

WELSCH

v.

THE HANNIBAL & ST. JOSEPH R. R. CO., Appellant.

(72 *Missouri Reports*, 451. *October Term*, 1880.)

Railroad companies are not bound to station flagmen at the crossing of public highways, no matter how dangerous. If the bell is rung, or the whistle sounded, as the train approaches the crossing, in compliance with section

806, Revised Statutes, a company fulfills its whole duty, except, perhaps, in a case where the crossing is of such a character that the employment of a flagman is one of the common and usual means of warning adopted by prudent railroad companies. In such case the omission to employ one might be negligence.

APPEAL from Marion Circuit Court.—Hon. John T. Reed, Judge.

Reversed.

Geo. W. Easley, for appellant.

Anderson & Boulware for respondent.

NORTON, J.—This is a suit for damages to plaintiff's horses and wagon, alleged to have been sustained at a crossing of a public highway in Marion County, by reason of defendant's negligence. The negligence averred was: 1. In not having a flagman or watchman at the crossing; 2. In not sounding the whistle or ringing the bell as required by statute; 3. That the servants and agents of defendant in charge of said train, so carelessly and negligently propelled the same, and made such great noise and shrieks by blowing the steam whistle attached to the locomotive, that the horses were frightened and ran away, etc. The answer was a general denial. On the trial plaintiff obtained judgment for $350, from which defendant has appealed.

The evidence tended to show that where the Palmyra and Lagrange road crossed the railroad, near the highway bridge across North River, the highway is cut out of the side of the rock bluff, gradually descending from the top of the hill, which is twenty-five or thirty feet high, till about twenty feet from the railroad, where it reaches the level of the railroad and crosses it at grade; that this road cut out of the side of the rock bluff was "very rugged and uneven," and wagons going along there make a great deal of noise; that from the top of the hill, nor down to the level of the railroad, in fifteen or twenty feet of the track, a train could not be seen; that plaintiff, about half past ten o'clock in the day, knowing that a passenger train was due at that hour, stopped, looked and listened for a train, but neither seeing one nor hearing the customary signals of an approaching train, drove his wagon and team forward and discovered a train about fifty yards from him as his horses stepped on the crossing; that plaintiff got across the track, and his horses becoming frightened by the sharp sounding of the whistle ran off and fell over the bluff of the river, killing themselves and destroying the wagon and harness; that from the location of the road, the intervention of the bluff, and the noise made by the wagon, it was difficult to hear either bell or whistle. The evidence was conflicting as to whether either the bell was rung or whistle sounded. The evidence also tended to show that the defendant had kept a watchman or flagman at the said crossing up to within about eighteen months before the injury complained of occurred, and that plaintiff knew that for that length of time there had been

no watchman at the crossing. Upon this state of facts the court gave, over defendant's objection, the following instruction:

If the jury find from the evidence that the public highway running north from the city of Palmyra, from a point some two or three hundred yards before it reaches the point where it is crossed by the railroad, to within a few feet of the south end of the bridge across North River, is constructed by cutting into the side of the bluff, leaving the bed of the highway uneven and rocky, and if the jury further find that persons travelling on said highway, going north toward said crossing and bridge, in wagons or other vehicles, by reason of the noise made by such vehicle, and the intervention of the bluff between the point on said highway at which said vehicle was descending said bluff, and the train approaching said crossing from the east, could not ordinarily hear the whistle or bell and could not see said train, and if the jury find that by reason of the above facts said crossing was unusually dangerous to the safety of travellers and their teams approaching said crossing from the direction of Palmyra, it was the duty of defendant to station at said crossing some watchman or other agent to warn such travellers so approaching said crossing of the approach of trains coming from the east, or to adopt some other means by which the crossing of their road at said point by such travellers would be rendered reasonably safe; and if the jury further find that defendant, its employees and agents, neglected to station a watchman or other agent at said point to warn travellers, and neglected to adopt any other means to render this crossing of their road at said point by such travellers reasonably safe, and if the jury further find that the injury to plaintiff's wagon and horses was caused by such negligence of defendant or its employees or agents, the verdict should be for plaintiff.

This instruction in effect tells the jury, as a matter of law, that it was the duty of the defendant to station a watchman at the crossing, if they believed that such crossing was unusually dangerous to the safety of travellers, and that its failure to do so rendered it liable for injuries occasioned thereby. Section 806, Revised Statutes, enjoins it as a duty on every railroad either to ring a bell or sound a whistle at least eighty rods from the place where such railroad shall cross any travelled public road. The above instruction adds another and additional duty to those imposed by the statute, and that this cannot be done has been expressly held in New York, where there is a statute of which the above section is a literal copy, and from which it was borrowed.

In the case of Beisiegel *v.* New York Central R. R. Co., 40 N. Y. 9, is said: "The question is fairly presented whether a railroad company is required by law to station a flagman at every street or road crossing, where in the opinion of a jury the travel is such that ordinary prudence requires it, for the purpose of warning and

keeping travellers off from such crossing when trains are passing over it." In the disposition of this question it was observed that "railroads are authorized by statute to construct their roads and run their trains across streets and highways. The same statute provides that they shall give certain signals for the purpose of warning travellers of their approach and presence; such signals being in the judgment of the Legislature sufficient to protect the public from injury in the use of crossings. Keeping a flagman at the crossing, or any of them, is not required by statute; nor does the statute require the company to give warning to travellers other than as therein required. The question remains whether the common law requires the company to warn travellers of approaching trains by other and more effective means than the statute requires. The claim that it does, is based upon the maxim that every one must so use his own as not to injure another. In applying the maxim it must be borne in mind that the traveller and the railroad has each an equal right of way in the crossings, derived from the same authority; the former for the purpose of travel, and the latter for running its trains. A collision is somewhat dangerous to the trains, but vastly more so to the traveller. The law imposes upon both the duty of observing care to avoid them. But the care imposed upon the company is in operating its trains, in so transacting its business in the exercise of its right of way, as not to injure others in the exercise of their similar right, provided the latter exercise due care on their part. This relates to the mode of operating the trains and all other things done by the company in the transaction of its business. It does not require the company to employ men to keep travellers off the track, or to serve notices upon them that trains are approaching. Should the company do this, it would relieve the traveller from all necessity of exercising care in this respect, and it would indeed be safe for him to go upon the track, having received no express warning. If the exertions of the flagmen were in any particular case inadequate to prevent injury to a traveller, upon the same principle it might be submitted to a jury whether ordinary prudence did not require gates to be closed at certain crossings while trains were passing, or something else done to protect the traveller, and if in their judgment it did, to instruct them that such omission was negligence."

So in the case of Weber *v.* New York Central R. R. Co., 58 N. Y. 459, where the same question was considered, it was held that "the duty of posting flagmen, or having servants and agents, or placing gates or other obstructions, or of giving special or personal notice to travellers at railway crossings, can only be imposed by the Legislature."

If there had been evidence in this case tending to show that at such a crossing as the one where the injury occurred, the employment of a flagman was one of the common and usual means of

warning adopted by prudent railroad companies, then the omission to have employed one might have been negligence, and had that question, with evidence upon which to base it, been submitted to the jury, as it was in the case of Kinney *v.* Crocker, 18 Wis. 74, under the authority of that case it might have been justified. Judgment reversed and cause remanded. All concur.

See note, p. 128.

The Pennsylvania Company

v.

Hensil.

(70 *Indiana Reports*, 569. *November Term*, 1880.)

In an action by the injured party, against a railroad company, to recover damages for injuries alleged to have been inflicted upon the plaintiff, by the defendant's train of cars, through the negligence of the defendant's employees running the train, the complaint alleged the negligent construction, by the defendant, of a number of parallel railroad tracks across a public street at a point where the plaintiff was attempting to cross when injured; also the negligent condition of the sidewalk crossing such tracks; also the failure of the defendant to keep a watchman at such crossing, as required by an ordinance of the common council of the city within which were such street and crossing; also the failure of such employees to sound the whistle and ring the bell of the engine when approaching the crossing. The failure to sound the whistle having been proved by the plaintiff, the defendant offered in evidence another ordinance of such council, prohibiting the sounding of whistles and ringing of bells on engines while passing through the city.

Held, that the exclusion of such evidence was erroneous.

It was erroneous to instruct the jury, in such case, that, if there was a city ordinance requiring the defendant to keep a flagman at said crossing, "then the defendant could not fail or neglect to comply with its requirements, without being guilty of negligence," if such negligence be not connected with the alleged injury.

While such a failure is negligence, per se, the instruction should have treated upon the question as to whether such negligence was a proximate cause of the injury.

It was error to instruct, in such action, that the commission, by the defendant and its agents, of the acts alleged in the complaint as constituting negligence, ipso facto, rendered the defendant guilty of negligence.

A. Zollars, F. T. Zollars and J. Brackenridge, for appellant.

W. H. Coombs, J. Morris and R. C. Bell, for appellee.

Niblack, C. J.—The complaint in this case was in two paragraphs.

The first averred that the defendant, the Pennsylvania Company, the appellant here, was, on the 30th day of October, 1876, engaged

in operating a railroad running through and across the public streets of the city of Fort Wayne; that a number of tracks and side-tracks, pertaining to said railroad, had been negligently constructed across Hanna street, a public street of said city, crossing and intersecting each other near said street, so that it was difficult for persons passing upon such street to determine upon which track an approaching train might cross it; that on that day, while the plaintiff, Anna Hensil, an infant eight years old, who is the appellee here, was passing along and upon the east side of said street, without negligence on her part, the defendant was negligently running its cars and engine back and forth over and across such street, and negligently ran a train of cars upon and over her, and thereby so injured one of her limbs that it had to be amputated; that, at the time, the whistle on the engine was not sounded, nor the bell rung, nor was there any watchman on the crossing, to keep her off the tracks, or to warn her of the approaching train; that there was an ordinance of the city of Fort Wayne requiring a watchman to be kept at that crossing, for the purpose of warning persons of approaching trains. A copy of the ordinance referred to was unnecessarily filed with the complaint.

The second was much like the first, except that it averred that the defendant was operating the Pittsburgh, Fort Wayne and Chicago R. R., and that the planks on the side-walk on the east side of Hanna street, where the plaintiff had to cross, and between the rails of the railroad tracks, had been carelessly laid and were out of repair; that for that reason, and in consequence of the whistle not being sounded, nor the bell rung, and there being no watchman at the crossing, the plaintiff did not see the approaching train until she fell down, and it struck her as above stated.

The defendant demurred separately to each paragraph of the complaint, but both paragraphs were held to be sufficient. An answer in general denial was then filed.

A jury returned a general verdict for the plaintiff, for seven thousand five hundred dollars, together with answers to numerous special interrogatories submitted to them at the request of the parties respectively.

The defendant moved for a judgment in its favor upon the answers of the jury to the special interrogatories, but that motion was overruled. Motions for a new trial and in arrest of judgment were also successively overruled, and judgment was rendered against the defendant upon the general verdict.

It is claimed on behalf of the appellant, that the demurrer ought to have been sustained to the second paragraph of the complaint, but in our estimation no valid objection to that paragraph has been shown.

The facts of this case, as they were made to appear on the trial, may, in general terms, be stated as follows:

On the evening of October 30th, 1876, the appellee, who lived with her parents south of the appellant's railroad, and who was attending school north of that road, and was then about eight years old, was passing over the railroad on the east side of Hanna street, in the city of Fort Wayne, on her return home from school. There were seven or eight tracks or side-tracks belonging to the road and running near to, and generally parallel with, each other, across Hanna street at that point. When the appellee, in her attempt to cross the railroad, had reached perhaps the fifth track, counting from the north, she was struck by a train of cars, consisting of an engine, a tender and two box-cars, then being slowly backed over Hanna street from the west, and one of her legs was thereby so broken and crushed that it had to be amputated. The crossing was necessarily a somewhat dangerous one. There was no side-walk over the railroad on the west side of the street. The several side-tracks approached the street from the west in curved lines, and so crossed and intersected each other as to make it difficult for an inexperienced person to determine upon which track a train from the west would cross the street, although the tracks and all trains upon them might have been seen for the distance of nearly, if not quite, a quarter of a mile, looking west from the crossing. The engine of the train which struck the appellee was at the west end of the train. The engineer was on the engine, and a brakeman was on the tender, but there was no brakeman on the forward car at the east end, nor was any one upon either of the box-cars, to look out in advance or to notify persons of danger. On the east side of the street there were some rows of coal bins or boxes, almost touching the sidewalk. These bins were about five feet high, and tracks of the railroad ran between them. At the time the appellee approached the crossing, there were an engine and one or two cars upon one of the tracks between these coal bins, the cars being loaded with coal and the engine blowing off steam. The appellant had a flagman at the crossing, as required by an ordinance of the city, for the protection of persons passing and repassing in that vicinity. Just before the collision a wagon and a balked team of horses were standing on the street near the east side, and not far from the fifth railroad track, around which the flagman, and many other persons, were gathered, and to which they were giving their attention. The flagman did not see the appellee until she was on the track, only a few feet in front of the cars, when he hallooed at her to go back; and in attempting to go back, either in consequence of a defect in the plank between the rails or of a misstep, she fell on the track and was injured as hereinbefore stated. A larger school girl who accompanied the appellee, but was in advance of her, passed over all the tracks safely.

An ordinance of the city of Fort Wayne was read in evidence by the appellee, which provided, amongst other things, that a flagman

should be kept and maintained by the proper railroad companies, at all railroad crossings on Hanna street, "whose duty it shall be to signal persons travelling in the direction of any or either of the crossings aforesaid, and warn them of the appoach of any locomotive, engine or other impending danger."

The appellee introduced evidence tending to show that the whistle of the locomotive, attached to the train which injured her, was not sounded as the train approached the Hanna street crossing.

The appellant, in defence, offered to read in evidence an ordinance of the city of Fort Wayne prohibiting the sounding of a locomotive whistle during the ordinary transportation of trains through that city, but the court, over the exception of the appellant, refused to permit the proposed ordinance to be read.

No satisfactory reason for the exclusion of the ordinance thus offered in evidence has been suggested, and we confess our inability to recall any principle on which its exclusion can be defended, in view of the appellant's alleged failure to sound the whistle, contained both in the complaint and in the appellee's evidence.

The concluding portion of the third instruction, given in this case to the jury at the request of the appellee, was as follows:

"You may also inquire whether or not the city of Fort Wayne had, by an ordinance, required the defendant to keep a flagman at said crossing, to notify persons of the approach of cars and engines to said crossing, and warn them of danger; for, if there was such an ordinance, then the defendant could not fail or neglect to comply with its requirements, without being guilty of negligence."

The appellant sharply criticises as much of the instruction as is thus set out, and argues against the doctrine implied by the language thus used.

The force and effect of a city ordinance regulating the running and management of railroad trains, within the limits of the city, upon a civil action against a railroad company, like the case before us, is a question upon which the authorities are not entirely in accord. But the weight of authority is overwhelmingly to the effect that the failure to perform any duty imposed either by a statute or an ordinance is negligence per se, and entitles an injured party to recover, provided the failure was a proximate cause of the injury. Thompson Negligence, 419, 1232; Shearman and Redf. Negligence, secs. 484, 485.

Therefore, to have made the third instruction, given as above, properly and strictly applicable to this case, the jury ought, also, to have been informed by it in some way, that, to entitle the appellee to recover for a failure to comply with the ordinance referred to, such failure must be shown to have been a proximate cause of the injury complained of.

The appellee contends that a fair construction of the two preceding instructions, when taken in connection with this third instruc-

tion, did so inform the jury, but whether that construction can be sustained, we will not now enquire, as the conclusion we have reached upon the case in other respects makes such an enquiry at present unnecessary.

One thing, however, in this connection, ought always to be borne in mind, and that is, in all actions for negligent injuries, it is not enough to show that the defendant has been guilty of negligence. It must also be made to appear that the imputed negligence was a proximate cause of the injury sued for. That fundamental rule seems to have been, to some extent at least, lost sight of in several of the instructions given in this cause.

By the sixth instruction, given at the request of the appellee, the court said:

"If you find from the evidence that the train that struck the plaintiff, if one did strike her, consisted of two cars and an engine; that the two cars were being backed over the street; that there were no brakes or brakemen on the front car as it passed over the crossing, and no one in advance of the cars; that no bell was rung as the train was backing over the street; that the crossing was in a populous part of the city and much frequented by people continually passing over it—then you should find the defendant guilty of negligence."

The facts enumerated in this instruction may or may not have constituted negligence, depending upon other facts which may have had some relation to the alleged injury to the appellee. As an instruction, it confounded that which, under the circumstances, only tended to prove negligence, with negligence itself. It assumed to make a matter of law out of facts which the jury were entitled to consider in connection with other facts which had been submitted to them.

The cases in which the question of negligence can be thus withdrawn from the jury are of comparatively rare occurrence. It is only when the circumstances of a case are such that the standard of duty is fixed and certain, or when the measure of duty is defined by law and is the same under all circumstances, or when the negligence is so clearly defined and palpable that no verdict could make it otherwise, that the court is authorized to make the question of negligence one of law and not of fact. Thompson Negligence, 1236; Shearman and Redfield Negligence, sec. 11.

The court evidently erred in giving this sixth instruction.

This case affords a rather remarkable instance of what we too often meet with in modern practice, and that is an over-instructed jury. Nineteen instructions were given at the request of the appellee, four were given by the court on its own motion, and twenty-seven were given at the suggestion of the appellant. As these instructions will be necessarily reconsidered, and possibly very greatly

condensed, upon another trial, we will not further comment upon them in detail.

The judgment below is reversed, with costs, and the cause remanded for a new trial.

See note, p. 128.

THE TERRE HAUTE AND INDIANAPOLIS R. R. Co.

v.

CLARK, Administrator.

(73 *Indiana Reports*, 168. *November Term*, 1880.)

An exception to the ruling upon a motion for judgment upon answers to special interrogatories, notwithstanding the general verdict, presents such question to the Supreme Court without any bill of exceptions.

In an action by the administrator of a decedent against a railroad company for causing his death at a railroad crossing, by negligently running a train of cars over such crossing, the rate of speed of such train, in connection with other circumstances, may be considered in determining the question of negligence; but the rate of speed at which a train can be run with safety to the passengers can not, in itself, be deemed negligence as against one who is injured thereby at such a crossing.

Where, in such action, it is shown that the deceased, possessed of all his faculties, and knowing the existence and location of the railroad, and presumably familiar with the time of the trains running thereon, approached the railroad crossing in a covered wagon, with no opening except in front, without stopping still at any point to look or listen for an approaching train, and, for a distance of more than forty yards from such crossing, drove his team in a trot, without stopping or looking, until he reached the crossing where he was run over and killed, such conduct is contributory negligence on the part of the deceased, and is sufficient to bar an action by his administrator to recover damages for his death.

FROM the Hendricks Circuit Court.

J. G. Williams and L. M. Campbell, for appellant.

J. V. Hadley, J. O. Parker, E. G. Hogate and R. B. Blake, for appellee.

WOODS, J.—The action was by the appellee against the appellant for causing the death of William Spaulding, the appellee suing as administrator of the estate of the deceased.

The complaint is in two paragraphs.

In both paragraphs it is shown that on the 30th day of January, 1878, the said William Spaulding was travelling in his wagon, drawn by two horses, along a public highway leading from the Cumberland road, in Hendricks County, Indiana, to the town of Danville, in the same county, which highway is known as the

"Danville and Cartersburg Gravel Road," and crosses defendant's railroad in the midst of the town of Cartersburg, in said county of Hendricks.

The gravaman of the cause of action is stated in the first paragraph as follows, viz.:

"And the plaintiff says that, as the said William Spaulding had reached the said crossing in said town of Cartersburg, the defendant carelessly and negligently caused one of its locomotives, with a train of cars attached thereto, to approach said crossing, and then and there pass at a great and unusual rate of speed over the track of said railroad, and without proper care, and negligently and carelessly omitted, while so approaching said crossing, to give any reasonable, timely or proper signals, by ringing the bell or sounding the steam whistle at a reasonable and proper distance from said crossing, by reason whereof he (Spaulding) was unaware of their approach, and that, by reason of said negligence and carelessness of said defendant, her servants and employees, and, without any fault or negligence on his part, the said locomotive struck his horses and wagon on said crossing, thereby injuring said horses and demolishing said wagon, and instantly killing said William Spaulding."

In the second paragraph of the complaint the same state of facts is shown, but the defendant is charged with having "carelessly, recklessly, purposely, wilfully and negligently" caused the death of Spaulding.

The answer was a general denial. Two trials by jury were had. The first jury failed to agree. The second gave a general verdict for the plaintiff, assessing the damages at one thousand dollars, and judgment was given accordingly. The jury returned answers to special interrogatories, and on these the appellant moved for judgment, notwithstanding the general verdict, and excepted to the overruling of the motion. No bill of exceptions was filed to show this exception; and counsel for the appellee claim that no question is saved for the consideration of this court. The point has been ruled against the position of counsel in Salander *v.* Lockwood, 66 Ind. 285, overruling, in this respect, Shaw *v.* The Merchants National Bank, 60 Ind. 83, and following, though not citing, Campbell *v.* Dutch, 36 Ind. 504.

The counsel for the appellant insist that the answers to interrogatories show affirmatively that the defendant was not guilty of the negligence charged; and that the deceased was guilty of negligence, causing or contributory to the cause of his death.

The following are the interrogatories and answers of the jury, so far as pertinent to the questions to be decided:

"1. If the deceased, William Spaulding, had stopped his team at any point within a distance of 150 yards from the railroad cross-

ing, could he have heard the sound of the approaching train? Answer. Yes.

"2. If the deceased had approached the railroad crossing, driving only in a walk, and had looked out for the train at a distance of 30 feet therefrom, could he have stopped his team before reaching the track? Answer. Yes.

"3. If the deceased had looked in a westerly direction, at a point 60 feet south of the crossing, could he have seen the approaching train in time to stop his team before reaching the track? Answer. No.

"4. Was the defendant's train, on the evening of the 30th of January, 1878, at the time of the death of said Spaulding, being run at a greater rate of speed than was usual or customary for that particular train, at that hour of the evening? Answer. No.

"5. Had not the defendant, for a long period of time prior to the 30th of January, 1878, run a fast mail and express train east at about the same hour each evening, and at about the same rate of speed at which the train was going on said January 30th? Answer. Yes.

"6. Could the deceased, by the use of ordinary care and prudence, on the evening of said date, have stopped his team before reaching the railroad crossing, and avoided the accident? Answer. No.

"7. Did not the agents of the defendant, in charge of the train which killed the deceased, sound the whistle and give the signal at the usual distance from the crossing, viz., about 800 feet west from the same? Answer. Yes.

"8. Did not the deceased, at a distance of more than one hundred feet south of the crossing, hear the sound of the approaching train, and attempt to cross the track before it? Answer. No evidence.

"9. Did the engineer in charge on the 30th of January, 1878, see the deceased about to drive upon the track, or did he have reason, from what he saw, to suppose the deceased was about to drive upon the track, in sufficient time to stop his train and prevent the collision? Answer. No.

"10. Did not the deceased drive his team in a trot towards the railroad crossing, for the distance of more than forty yards, without stopping to look or listen for an approaching train? Answer. Yes.

"11. Did not the deceased drive on the railroad crossing without stopping still at any point to look or listen for an approaching train, and was he not at the same time in a covered wagon, without any opening except in front? Answer. Yes.

"12. What direction was the train going by which Spaulding was killed? Answer. East.

"13. What direction was the wind blowing on said evening? Answer. From the east.

"14. Was it not snowing considerably at the time the deceased drove on the railroad track and was killed? Answer. Yes.

There is not enough shown by these answers to interrogatories to enable us to say, as matter of law, that either the apellant or the deceased was free from negligence, causing or contributing to the injury. All that is found concerning the conduct of the appellant is in questions 4, 5, 7 and 9, and the answers thereto, but, notwithstanding these, there may have been proof of negligence. For instance, while it is shown that the whistle was blown eight hundred feet or more away, it is not found that the bell was rung as the train approached the crossing. The rate of speed is not found, and, though that train was not running faster than usual, its usual rate may have been very great, too great to be safe or justifiable. We do not mean to be understood as saying or intimating that any rate of speed, at which a train can be run with safety to the passenger, can in itself be deemed carelessness as against one who gets hurt at a crossing. The tendency of the times seems to be—indeed, the sentiment now apparently prevails—that the railroads shall run trains for carrying the passengers and mails at high rates of speed, and the rights of individuals, and the degree of caution which they must use in passing over the railroad tracks, must be measured and adjusted accordingly. Still, it is, and doubtless will remain, true that the rate of speed, in connection with other circumstances, may be considered in determining the issue of negligence in such cases as the one under consideration.

It remains to be considered whether the deceased was free from fault. It is not found that he knew there was a railroad in the vicinity, and did not come upon it all unaware of the train's approach. He drove his team in a trot towards the crossing for the distance of more than forty yards, without stopping to look or listen; but this may, for all that is found, have happened before he came within a mile or ten miles of the crossing. He drove on the railroad crossing without stopping still at any point to look or listen, but there is no rule which requires a man with a team to stop still. It would in many cases, perhaps, be impossible to do so, and, under supposable circumstances, it would not be necessary to stop, either to look or listen.

We think it quite clear that the court committed no error in overruling the appellant's motion for judgment on the special findings, notwithstanding the general verdict.

The appellant made a motion for a new trial, on written reasons filed, viz., that the verdict is not sustained by sufficient evidence, and is contrary to law, which the court overruled. This motion, we think, should have been sustained. There was no real conflict

in the evidence, and what is lacking in the special findings to show negligence on the part of the deceased is fully supplied in the evidence, and there is no evidence at all to support the charge in the second paragraph of the complaint, that the defendant purposely and wilfully caused the death. Indeed, it is by no means clear that the evidence shows any negligence on the part of the defendant. But it does show that the deceased, possessed of all his faculties, and knowing the existence and location of the railroad, and presumably familiar with the time of the fast train, which had been running regularly for some time before, approached the crossing in a covered wagon, with no opening except in front. When about fifty yards from the crossing, he was seen by one witness to check his team, lean forward and look to the east and to the west, and thence he drove on in a trot, without stopping or looking until he reached the crossing, at which instant the horses stopped for a moment, whether through fright or the pulling of the lines by the deceased, is uncertain, and then sprang across the track, the engine striking the wagon and instantly killing said Spaulding. On the west side of the highway on which the deceased approached the crossing, there were, in some places, buildings which obstructed the view in the direction of the railroad to the westward, and one of these buildings stood but thirty feet south of the railroad track. The other material facts are shown by the answers to the interrogatories. If the deceased heard the coming train, as many of the witnesses heard it, as he approached the crossing, his death was either a suicide or the result of gross carelessness; but, whether he heard it or not, his driving upon the crossing in a trot, under the circumstances, was certainly such contributory negligence on his part as bars the action of his administrator for his death.

The counsel for the appellee insist that the presence of the houses obstructing the view, and the fact that it was snowing, were circumstances that made it gross negligence on the part of the appellant to move its train at the rate of speed at which it was running at the time of the accident. It seems to us, on the contrary, that these were circumstances which enhanced the degree of caution with which the deceased ought to have approached the crossing.

The judgment of the circuit court is reversed, with costs, and with instructions to grant a new trial.

See note, p. 123.

CHICAGO AND NORTHEASTERN RY. CO.

v.

MILLER.

(*Advance Case, Michigan. October* 5, 1881.)

An old man, who was somewhat deaf, while driving a span of colts towards a railway track down a narrow road from which the track was concealed on one side by a high embankment, stopped to listen, but hearing nothing drove on and when close by the track a train appeared within a few rods. Fearing that he could not control his horses where they were, he whipped them up, and tried to cross the track, and the rear of the buggy was struck by the locomotive. *Held*, that in an action for the resulting injury the question whether plaintiff was guilty of contributory negligence was for the jury.

In declaration for a railway injury, an averment that defendant negligently and carelessly drove a certain locomotive upon the railroad up to, upon and across a certain public highway at the crossing of the same and the said railroad, without giving the necessary statutory signals, viz., ringing a bell or sounding a whistle, was a sufficiently specific averment of defendant's negligence when taken in connection with the averment of consequential injury, and it entitled plaintiff to support it by evidence, under defendant's plea to the general issue. The neglect of a railroad company to ring a bell as required by statute when approaching a crossing will make it liable for any injury resulting from such neglect.

ERROR to Genesee.

P. B. Gaskill, for plaintiff in error.

Long and Gold, for defendant in error.

MARSTON, C. J.—Two principal questions have been presented on the argument in this case. The declaration it is said is defective in not averring specifically the negligence of the defendant which caused the injury. The declaration that at a certain time and place the defendant negligently and carelessly drove a certain locomotive upon and along the railroad up to, upon and across a certain public highway, at the crossing of the same and the said railroad, without giving the necessary statutory signals, viz., ringing a bell or sounding a whistle. Here the specific act of negligence is pointed out, and evidence was introduced tending to sustain the averment. This averment with allegation of consequential injury in our opinion was sufficient, and entitled the plaintiff to introduce evidence, under the plea of the defendant, in support thereof. It was the duty of the company to at least ring a bell on approaching the highway where the injury was done, and a failure so to do would render it liable in case any person was injured in consequence of such neglect.

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It is next claimed that the facts as proven would not entitle the plaintiff to recover, because under his own showing he was guilty of contributory negligence.

It is conceded that the record shows but few disputed facts. If the testimony of the plaintiff, taken as a whole, fairly tended to make out a case in all its parts, then the court was right in submitting the same to the jury under proper instructions, even although the evidence on the part of the defendant may have been strong against a right to recover. The plaintiff was a farmer, aged 67, and on the morning of June 11th started from his home, accompanied by his daughter, for Flint. He drove a spirited team of well-broken three year old colts, that had never been near or seen the cars. The highway as it approached the track had been cut down, leaving quite high embankments which prevented a view of the railroad track in the direction from which the locomotive approached. The plaintiff when about 16 rods from the track stopped his team, listened and watched, and as he approached the track, the highway was narrow on account of the grade, a wagon loaded with gravel crossed the track, and the driver thereon spoke to the plaintiff, but owing in part to the latter being a little deaf, he did not hear what was said, but inferred from the motion made that a train was coming. The plaintiff could not then see the train; he spoke to his horses, and as they reached the track, or when within two rods of it, he saw the locomotive approaching about 12 rods distant. He said, "At the first glance I made up my mind I would get across that track and I swung my whip, and they (the hosses) both jumped; and while crossing the locomotive struck the hind wheels of his wagon causing the injury. The banks on the north side of the road were some 12 or 15 feet high, and the following testimony will perhaps show as clearly as any other, the plaintiff's view of the situation at the time and why he took the course which he did.

Question. You may state to the jury why it was when you first saw the train you didn't hold your horses and let the train pass. Answer. It was under the impulse of the moment the whole thing was done; had I undertaken to have held them one chance out of a hundred they might have stood; they were a pair of three year old colts at the top of their mettle. Q. State why you didn't stop your horses? A. I was partly sure I would get under the cars if I undertook it; if the horses would whirl they could not whirl this way, (illustrating,) against the bank, and if they whirled that way (illustrating) they would throw me on the track; if I was in the same position to-day I would do the same thing. . . . Q. Did you hear any bell rung or whistle sounded before you were struck? A. No, sir. Q. State what effort you made to hear it? A. I did the very best I knew how. Q. Were you listening for it? A. Yes, sir. Q. State what care you exercised in looking for

the train before you reached the crossing? A. I took every care I could. Q. What did you do? A. I drove carefully, watching and leaning forward and looking; when I got pretty near there I saw the cars and then I made an effort to get across.

On cross-examination he said that if his team had been steady and not afraid, so that he could have controlled them in such a place, he would have stopped and not attempted to cross on first discovering the cars. Question. The only object you had in crossing was because you thought you could not control the horses when the engine passed? Answer. It was because I was afraid the horses would throw me on the track. Q. The only reason why you undertook to cross before the engine did, was because you were fearful you could not control the colts and hold them while the engine went up the track? A. Yes, sir. Q. That is one reason? A. Yes, sir. Q. Before you raised the whip to increase the motion of your horses you saw the engine approaching? A. Yes, sir. Q. You thought by applying the whip to the colts that you could get across the track before the engine got to you? A. Certainly. Q. That is what you calculated on? A. Yes, sir.

There was another road the plaintiff could have taken, and avoided this particular crossing, by going about a mile further; but this was the road usually taken by him, and was a public highway used as such. The fact that the plaintiff was driving a span of colts, or that he took this road instead of another and perhaps safer one, would not be such contributory negligence on his part to prevent a recovery. His right to drive young horses and to travel on any public thoroughfare cannot thus be abridged. We do not say that there may not be cases, where the character of the team, and the road taken, in proference to another equally convenient or nearly so, and safer, might not be taken into consideration by a jury with the other facts in the case, as tending to show a want of ordinary care. It must, however, be a very strong state of facts indeed, that would justify a court in taking the case from the jury. The matter should not be in doubt, and we are not prepared to say that men of ordinary care, prudence and intelligence would have considered it dangerous to have taken the road in question with a team like the one driven by the plaintiff. From his testimony it does not appear that he did not exercise due care and caution in approaching the crossing, and it is only when he gets within a few feet of the railroad track and sees a train approaching and close at hand, that he can be charged with negligence in attempting to cross the track. This was the first warning or knowledge that he had that a train of cars was near, and with a high embankment on one side, and the apparent danger in attempting to turn in an opposite direction; without time for reflection or to deliberate and calculate or measure distance, he had to determine his course and instantaneous-

ly make the attempt. That he was in a dangerous position, whether he stood still, attempted to turn or to cross the track cannot be doubted; and of this he seems to have been well aware. The preservation of his life and property, we might well assume, would lead him to take what he then considered the safest course, in view of the facts and surrounding circumstances then apparent to him. A stricter rule should not be held here than in criminal cases, where the right of one in apparent danger to act upon circumstances as they appear to him at the time is well settled, and although subsequent investigation may show that he erred, yet that alone will not make him criminally responsible. If the neglect of the company to sound a whistle when approaching the highway, permitted the plaintiff to drive into a dangerous position, under circumstances which allowed him no time for calm reflection, and he, acting upon the spur of the moment, in his efforts to avoid the danger, made a mistake, and took what subsequent cool deliberate investigation may show to have been wrong, and that some other course would have been better if not absolutely safe, yet he cannot be charged with contributory negligence because of such error of judgment under such dangerous circumstances. This is the rule in both civil and criminal cases, sustained by an abundance of authority, if any indeed were needed. This case was, therefore, very properly submitted to the jury upon the facts.

We do not understand any serious objection made to the charge of the court, touching the right of the plaintiff to recover, in case the jury found him to have been guilty of negligence, and a careful examination of the instructions given show that no complaint could well be made thereto. The court repeatedly told the jury, that the plaintiff could not recover if he was negligent—so full and explicit were the instructions upon this subject that we need not quote at length therefrom.

In our opinion no error was committed and the judgment must be affirmed with costs.

The other justices concurred.

See note, p. 123.

KELLY

v.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

(*Advance Case, Minnesota. December* 24, 1881.)

Plaintiff, while crossing the railway of defendant upon a public street, driving a span of horses with a wagon, was struck by a train of cars propelled by an engine. Evidence that the train was propelled at an unlawful rate of speed; that no bell was rung, or signal given, as required by law; that it was an unusually dangerous crossing, and that no flagman was stationed there to warn travellers; and that a view of the passing train was obstructed from one approaching on the street by a train of cars left standing upon a side track, extending across the street, with an opening in the train for passage upon the street. *Held*, sufficient evidence to charge defendant with negligence.

It appearing that plaintiff, before going through the opening in the train and upon the track where the accident occurred, brought his horses to a walk, but did not stop them, nor leave his wagon and go forward where he could see an approaching train; that he looked and listened for a train, but could not see or hear any signal of its approach.

***Held*, that the evidence does not show, as a matter of law, contributory negligence on the part of the plaintiff.**

APPEAL from order of district court, county of Ramsey.

R. B. Galusha and Bigelow, Flandrau and Clark, for appellant.

C. K. Davis, for respondent.

DICKINSON, J.—This action was brought to recover damages upon the ground of negligence for injuries to the person of the plaintiff, and to his horses and wagon, caused by a collision with a train of cars of the defendant at the crossing of its line of road over Third street, in the city of St. Paul. The plaintiff having recovered a verdict, the questions are presented, upon this appeal from an order refusing a new trial, whether the defendant was shown by the evidence to have been chargeable with negligence in the premises, and whether it does not appear that the plaintiff was guilty of contributory negligence. The street where the accident occurred is much travelled. The plaintiff was familiar with the premises, and with the manner in which defendant was accustomed to run its cars and trains, and to guard the crossing hereafter stated. Several tracks of the defendant cross the street at this point upon the grade of the street. Much switching is necessarily done in this place in making up trains and distributing cars. Such work is done at all hours, and at times when regular trains are not running. The defendant was accustomed to have a flagman stationed at the crossing to warn travellers of danger between

the [illegible] in the morning and [illegible] at night. The accident occurred a little before [illegible] in the morning, when there was no [illegible] at the crossing. A train of [illegible] cars was standing [illegible] extending both to the north and south [illegible] street, the train being separated at the crossing so as to [illegible] between the cars at the crossing of about 30 feet, as the [illegible] of several witnesses went to prove. The injury was caused by a train consisting of four cars in front of an engine with [illegible] cars in the rear running on the track next west of that on which the [illegible] cars were standing. According to the testimony of several witnesses it was moving at the rate of from twelve to fifteen miles an hour, although an ordinance of the city forbade the running of cars at a greater rate of speed than five miles an hour. It is necessary in switching to move the cars in front of the engine, as was done in this case. The plaintiff was upon Third street, going west, driving a span of spirited horses. The evidence tended to prove that just before arriving at the railroad crossing he brought the team down to a walk, and had them under full control, but did not stop; that he looked both ways and listened for any approaching train, but heard none, and that no bell was rung or other signal given; that he could not see the coming train, because the train of [illegible] cars standing on the track shut it out from view. Plaintiff drove in the crossing between the cars standing on the first track, and as he passed through the opening in the train he saw the moving cars on the second track approaching the street crossing. He whipped his horses and attempted to pass over before the train but the hind end of his wagon was struck, causing the injury complained of.

The verdict necessarily involves a finding by the jury that the defendant was chargeable with negligence causing the injury complained of, and is sufficiently supported by the evidence. A finding by the jury that the train was run at an unlawful rate of speed, and that no bell was rung or other signal given of the approaching train, would be justified by the evidence, and the uncontradicted evidence showed that there was a great deal of travel upon the street at the place of the accident; that very many trains passed over the street crossing, and at all hours; that no flagman was stationed there to warn travellers of danger prior to 7 o'clock in the morning; and that the train of freight cars was so left as at least practically to obstruct the view of approaching trains from one coming to the crossing from the east. These facts abundantly support the conclusion of negligence on the part of the defendant. The defendant, however, more strenuously urges that the case presents a case of contributory negligence. The verdict in favor of the plaintiff expresses the finding by the jury that the plaintiff was not guilty of negligence contributing to produce the injury; and we have only to consider whether the evidence sustains that con-

clusion, or whether, as defendant claims, the case shows conclusively such negligence.

It is negligence for one, in the presence of any known danger, to omit to exercise such carefulness as prudent persons would ordinarily exercise under like circumstances; and since, to one approaching a crossing like that in question, the danger is obvious and great, the law holds it negligence for him to do so without the vigilant exercise of his senses of sight and hearing. Brown *v.* M. and St. P. Ry. Co. 22 Minn. 165. But ordinarily the question of negligence is one of intermingled law and fact, and is for the determination of the jury. The law does not—as it cannot—prescribe a general measure of carefulness, except that which varies with the circumstances of each particular case, viz., what would prudent persons ordinarily do under like circumstances? It was shown by evidence, the truthfulness of which it was for the jury to determine, that the plaintiff brought his team to a walk, and looked both ways and listened, but could neither see nor hear the train nor any signal of its coming. That he could not see the train nor hear it may seem remarkable, but it is perhaps sufficiently explained by the fact of the intervening freight cars. What, if any, other noises from any source may have prevented hearing the train the case does not disclose; but the testimony of plaintiff, and of another with him in the wagon, is that they looked and listened for the cars and did not hear them. We cannot say the fact was otherwise.

The proof that no bell was rung is from witnesses who testify to having listened to hear a bell, and that they did not hear any. It is more than mere negative testimony. The law required the ringing of a bell eighty rods distant from the crossing, and the conduct of the plaintiff might be properly regulated to some extent with regard to this duty imposed upon the defendant by law, and which he had a right to expect would be performed. He was not required to use every precaution which might have contributed to his safety, but only such as common prudence dictated. We cannot say, as a matter of law, that it was negligence not to have entirely stopped his team,—Kellogg *v.* N. Y. Cent. and Hud. Riv. R. R. Co. 79 N. Y. 72; Eilert *v.* Green Bay and Minn. R. R. Co. 48 Wis. 606; [S. C. 4 N. W. Rep. 769;]—or that common prudence required him to get down from his wagon, and go forward on foot to look along the line of the track. Duffy *v.* Chicago and N. W. Ry. Co. 32 Wis. 269; Davis *v.* N. Y. and Hud. Riv. R. R. Co. 47 N. Y. 400. Such precaution is believed to be extraordinary, and to exceed the strict measure of common prudence; nor is it clear that the course of greater prudence, after plaintiff had passed in between the freight cars standing on both sides of his way, and saw the coming train, was not to endeavor to force a passage, rather than

incur the perhaps greater hazard of attempting to turn back with a spirited span of horses.

Upon a consideration of the whole case, we see no reason to set aside the verdict of the jury, and the order refusing a new trial is affirmed.

Mr. Justice Clark, having been of counsel in this case, took no part in the decision.

See note, p. 128.

The Kansas Pacific Ry. Co.

v.

Lyman Richardson.

(25 *Kansas Reports*, 391. *January Term*, 1881.)

Where the plaintiff testified that as he approached, with his wagon and team, a railroad crossing of a public street in the city of Topeka, adjoining the passenger depot of the railway company, he looked to the west, (the direction from which the train came,) and all he saw was a large pile of lumber, and didn't hear any bell or whistle; and a witness stated that he was ten or fifteen feet from the depot, but heard no signals until the collision, and would have heard them if any had been given; and four other witnesses, who were present, testified that they did not hear the whistle sounded or the bell rung until the instant of the collision; and a passenger on the train and in a car next to the rear one stated that he didn't hear any alarm; and on the part of the defense, the fireman and engineer testified that they whistled for station above the tank 300 or 400 yards west of the crossing, and rang the bell continuously from the tank until the train stopped; and five other witnesses stated that they heard the whistle sounded 300 or 400 yards west of the crossing, and the ringing of the bell as the train came in; *held*, that there was a sufficient conflict of evidence to raise a question of fact whether proper and timely signals were given, and the trial court was justified in submitting the evidence to the jury for their consideration. *Held*, further, that there was evidence sufficient to sustain the finding of the jury that proper signals of the approach of the train to the crossing were not given.

Where the evidence on a question of negligence is doubtful and presents qualifying circumstances, and the inferences to be drawn from the facts are uncertain, it is the province of the jury to decide.

Where a person, as he approached a railroad crossing at the main thoroughfare of a city with his team and wagon, looked west, (the direction from which the train afterward came,) saw only a pile of lumber, and heard no bell or whistle, then looked ahead, saw the street clear and attempted to drive across, then tried to pull his team around to avoid the coming train, but too late to prevent a collision, and evidence is produced tending to prove that the train was coming in at too great a rate of speed, and that no timely signals of warning of the coming of the train were given, but some witnesses testified that they hallooed to him to stop as the train was coming, and one witness stated that he took off his hat at him and told him the train was coming, and such person testified, "He didn't hear anybody call," *held*, that it

will be left to the jury to say whether such person was guilty of contributory negligence. In such a case, and under such circumstances, the question of negligence or want of proper care is a matter of ordinary observation and experience of the conduct of men, and the judgment of a jury ought to control.

In an action by a plaintiff for personal injuries against a railroad company, it was averred in the petition that the injuries were caused by the neglect of the company in crossing the public street of the city with a locomotive and train of cars at a very swift, rapid, dangerous and reckless rate of speed, and without giving any warning of the approach of the locomotive and cars by sounding a whistle or ringing a bell, and that the view of the approach of the locomotive and cars was obstructed by cars standing on the track and by lumber piled in close proximity to the road: *Held*, not error, under the allegations, for the trial court to permit the plaintiff to prove that the company had no flagman at the crossing of the street, as one of the circumstances existing at the time and place of the accident.

ERROR from Shawnee District Court.

This action was brought September 5, 1879, by Lyman Richardson against the Kansas Pacific Ry. Co., to recover $10,000 for the injury to plaintiff's person and also to his team, harness and wagon, occasioned by the negligence of defendant's agents and employees in running over with its locomotive and train said team, etc., while being driven by him across Kansas avenue, a main thoroughfare of the city of Topeka, adjoining the passenger depot of the defendant. Plaintiff testified:

"I live on Western avenue and Fifth street; I came here last April, and have a wife and three children. On the 13th of last August, 1879, I was hauling rock for the distillery; was going from the bridge north on Kansas avenue; my team was going north on a slow trot. I looked to the west. All I saw west of me was a large pile of lumber. I had never been there before Monday; never saw the cars there but once; heard a good deal of noise; didn't hear bell, whistle, or anything. I looked ahead, and everything was all clear in the street. When I saw the train, the first thing I threw up my hands and pulled my team around, and the train whooped, whooped, whistled and struck about the same time. When I woke up, was lying on my back half-way down the depot building. I remember two men helping me up, and I said my back was hurt. I saw my horse with three legs cut off. When I got up and walked about, some gentleman asked if I was hurt. Some one came out and shot the horse. Wagon all smashed to pieces. Didn't know what became of my mule until Friday morning. My team, wagon and harness were worth $300. I was making $3.25 to $3.50 per day. I worked hauling rock. Never sick but once, twenty years ago, and doing heavy work. After cars struck me, I felt pain in my back. I went walking about; walked better that evening than afterward. In morning I lay flat on my back. Dr. Early came five or six times to attend me; gave me liniment to rub me. Was four weeks in bed. I couldn't tell what place was hurt; my

whole body was hurt; I suffered every night for two or three weeks. I ain't able to do anything, but walk about; can't work. I can't stoop over; have to carry my back straight. I first saw the cars; didn't hear whistle or bell, there was so much racket and noise. There was no one there to stop me or warn me. Was about "from here to there" from lumber. When I woke up was on platform of depot. I am about forty-three years old. I had sideboards and dumpboards in wagon, stone-hauling bed. My son was on the wagon with me. Railroad company has not paid me anything."

On cross-examination, witness further testified as follows:

"I made three trips on Monday; didn't see any cars on Monday. I made four trips on Tuesday; didn't see any cars except at sun-up. On Wednesday I saw four-horse 'bus at track. I was about length of this room from 'bus when I saw it first. Saw 'bus there before Wednesday morning. Didn't know what they were there for. I was in a big hurry; had made three trips before I got hurt. I was thinking about my business, and nothing else; wanted to make as many trips as possible. When I first looked up I wan't very far from road. When I got to street this side of track, I didn't know whether I looked up that street or not, but I did look west before I got to the track. Freight cars were behind lumber. Didn't hear anybody call; was thinking about my business. Boards rattled in wagon; lots of noise. Looked straight ahead. Didn't hear bell; can't swear whether one was rung or not. First thing I did when I saw train was to throw up my hands, to wheel horses round; they were on first ties of track; horses were turning when struck; wan't thinking about train. It was about five or six minutes after I was struck before I woke up. It hurt me worse to lean back than to stand up. I walked up stairs to see my boy; then I walked down stairs, and then home, on Western avenue and Fifth street. I saw the doctor first that night. Mr. Herald carried my boy home. Mr. Herald was there when I got hurt. I didn't send for Dr. Early. On this side of the bridge I was breaking down, and had to get a cane. I saw Mr. Herald at depot after I got hurt."

Reëxamination: "I looked and saw a pile of lumber on my left."

Upon redirect, plaintiff testified:

"On account of the accident, I lost the use of my sexual organs, and have not had the use of them since the accident. Dr. Early came to me five or six times, and said he would not come back until I sent for him. My son is well. I haven't paid Early anything, and have not promised to pay him anything; don't know what he charges. Haven't bought any medicine. I walked home after I was hurt. I don't think I took my mule and hitched him to the fence. I never heard man call out. Mr. Sheldon and another came to me and rubbed my back, and said, 'You will be all

right.' He said, 'We came to make a kind of settlement.' I said I felt so bad that I didn't want to talk."

There was other evidence of the occurrences at the time of the accident. Some of the witnesses testified that the train came in unusually fast; that there was a failure to blow the whistle or ring the bell until the collision, and that there was no flagman at the crossing. The evidence for the defendant was, that a number of persons hallooed to plaintiff for him "to stop—the train was coming;" that the driver of a four-horse 'bus, standing a few feet south of the track and west of the depot, hallooed and took off his hat at him, and "told him the train was coming;" that the whistle was blown 300 or 400 yards west of the crossing, and the bell rung continuously for 100 yards before reaching the crossing; and that the train was not running at a high rate of speed. The employees on the train gave evidence that all used due care. Other facts appear in the opinion. The court charged the jury as follows:

"This is an action brought by Lyman Richardson, the plaintiff, to recover from the defendant damages which he alleges were sustained by him from the careless, unlawful and negligent conduct and acts of the servants, agents and employees of the defendant. He alleges that the locomotive and train of cars of the defendant, while crossing Kansas avenue in the city of Topeka, ran against and over him, his wagon and team, injuring him and injuring his team, wagon and harness; that this was done by the negligence, carelessness, default and unskilfulness of the servants, agents and employees of the defendant, and without any fault of the plaintiff.

"The jury are the exclusive judges of the evidence, of its weight, and of the credibility of the witnesses.

"The burden of proof is upon the plaintiff to prove the alleged negligence, carelessness or fault of the defendant (or the servants, agents or employees), and injuries resulting therefrom, and that he, the plaintiff, was in the exereise of due care at the time, and that he was not guilty of any negligence that contributed to the injury of which he complains.

"By law, railroad companies are liable for all damages done to person or property, when done in consequence of any neglect on the part of the company.

"While this is the rule, the person injured must not be guilty of any act of negligence that contributed to the injury. If he is, he cannot recover. But if the negligence of the person injured contributed only in a remote degree to the injury, and the negligence of the company was the immediate cause of the injury, and with the exercise of ordinary prudence and care by the company the injury could have been prevented, then the company is liable. If the negligence of the person injured was slight only, and the negligence of the company was gross, there is no such contributory negligence on the part of the person injured as would prevent a recovery.

"Whether or not there was negligence on the part of the company or its employees, is a question of fact for the jury to determine from the evidence and the law as given them by the court. And if there was, what was its nature and degree?

"Now negligence is a want of due diligence. Common or ordinary negligence is the want of that degree care of which an ordinarily prudent man would ordinarily exercise under like circumstances.

"Slight negligence is merely the failure to exercise great or extraordinary care.

"Gross negligence is the want of slight diligence.

"The degree of care and diligence necessary and proper in each case varies according to the surrounding circumstances; and the jury, from all the evidence, must decide what degree of diligence and care is necessary and proper under the circumstances of the case proved.

"Railroad companies must be held to a higher degree of care in passing over a crossing in a populous city than in places where there is less travel. Regard for human life and safety demands this.

"In determining the question as to whether there was any negligence on the part of the defendant, it is proper to consider the rate of speed at which its cars were running; whether there was any neglect on the part of the defendant in giving proper warning before crossing the street. In deciding upon the degree of speed at which the cars were running, you may consider, in connection with the other evidence, the distance the cars ran before they stopped, after crossing Kansas avenue.

"It is not enough for the plaintiff to prove simply that the defendant was guilty of negligence, but you must be satisfied from the preponderance of the testimony, that but for the negligence on the part of the company the injury would not have happened.

"Now it is the duty of persons about to cross a railroad track to look about them and listen and see if there is danger, and whether they can cross the track in safety, and they are not relieved of this duty of care and caution by the fact that a train is behind time, or is running at an unusual rate of speed, or that they are absent-minded or absorbed in their own business. They are bound not to go recklessly upon the track, but to observe the proper precaution themselves, although they are not necessarily obliged to stop before crossing the track, to avoid accidents; and in such a case as this, it is indispensible to a right of recovery that the injured party shall have exercised ordinary care, such as a reasonable, prudent person will always adopt for the security of his person or property, or that the injury be wilfully or wantonly inflicted by the defendant, and the mere running at too great a rate of speed will not make the injury willful or wanton. He has no right to take for granted that no train is approaching, and if he approaches the crossing at such

speed as to be unable to control his team, or stop it if necessary at such a distance from the track as to avoid danger, he is guilty of negligence which will prevent a recovery. And if he sees the train, or could have seen it by the exercise of ordinary diligence, in time to stop his team, and did not stop it or attempt to stop it, he cannot recover. And if you find that the plaintiff was warned by bystanders that the train was approaching, in time for him to have stopped and avoided the collision, and did not heed them, he cannot recover, even though you may find that the defendant was guilty of negligence.

"Now, while it is a general rule that a person approaching a railroad crossing should use both eyes and ears to discover and avoid an approaching train, there may be circumstances, or a state of facts existing in some cases, where the most vigilant exercise of those organs will fail to warn and protect him—such, for instance, as noises, or obstructions, and in such cases the law does not charge a person with contributory negligence; but if such circumstances or facts were known to the person, it is only an additional reason why he should be more vigilant and cautious; and if, having such knowledge, he neglects to be duly cautious, he acts at his own risk.

"If the jury find for the plaintiff, they will assess his damages at such a sum of money as will fully and fairly compensate him for the damages sustained by reason of the injury received. They will take into consideration the nature and extent of his personal injuries, his sufferings, the length of time he was disabled, the value of his time, his expenses in being cured, his condition with respect to the injuries at this time, the effect the injuries will in all probability have upon him in the future, and the injury done to his wagon, harness and team. Taking all these elements into consideration, as shown by the evidence, you will, if your verdict is for the plaintiff, assess full compensatory damages.

"In addition to your general verdict, you will answer in writing the questions herewith submitted to you."

Whereupon the jury retired, and returned a verdict, together with the questions submitted, answered by them. A copy of said verdict, and the questions and answers, is as follows:

"Lyman Richardson, plaintiff, *v.* Kansas Racific Ry. Co., defendant.—We, the jury, find for the plaintiff, and assess his damages at the sum of two thousand dollars."

The jury answer the questions submitted to them in writing, as follows:

"Q. 1. At what speed was the train on this defendant's track running at the time of the injury? A. Fifteen miles per hour.

"Q. 2. Did the defendant, the Kansas Pacific Ry. Co., give the plaintiff, Richardson, proper signals warning him of the approach of the train as he, the plaintiff, approached the crossing? A. No.

"Q. 3. Was the defendant, the Kansas Pacific Ry. Co., guilty of gross negligence, which caused the injury to plaintiff? A. Yes.

"Q. 4. Was the plaintiff, Richardson, warned that the train was approaching in time to have stopped his team and avoided the collision? A. No.

"Q. 5. Did he use his eyes and ears as an ordinarily prudent man would have done under like circumstances? A. Yes.

"Q. 6. Irrespective of any warning by others, could he have heard or seen the train approaching in time to have avoided the danger, if he had used ordinary care and diligence? A. No.

"Q. 7. Did other persons, standing at an equal distance from the track with Richardson, at any time before he reached the track, hear the bell ringing or the engine approaching? A. No, situated as the plaintiff was.

"Q. 8. What (if any) negligence was Richardson guilty of contributing to his injury? A. Not any.

"Q. 9. Was the defendant guilty of any negligence contributing to the injury, and if it was, what was it? A. Yes. Running at too great a rate of speed and not giving suitable warning.

"Q 10. Did Richardson whip up his team just before reaching the track? A. Yes.

"Q. 11. What would the engineer have done that he did not do, after he discovered the plaintiff, to have prevented the injury? A. Nothing. It was too late.

"Q. 12. Was the plaintiff, Richardson, guilty of gross negligence, contributing to his injury? A. No.

"Q. 13. How near the crossing of Kansas avenue, on the side-track, was it possible for freight cars to stand and allow the passenger trains to pass? A. Fifty feet.

"Q. 14. How near to the east end of the lumber yard was lumber piled at such height as to obstruct the view of a train approaching from the west, to one riding north along Kansas avenue, and standing up in a wagon? A. Within five feet.

"Q. 15. Was Richardson standing up in his wagon as he approached the track? A. Yes.

"Q. 16. Could an ordinarily prudent man, in Richardson's position, have heard people call out in time to have stopped the team before reaching the track? A. No.

"WM. D. WHITTON, Foreman."

March 6, 1880, a motion for a new trial was overruled, and judgment rendered for the plaintiff upon the verdict. The railway company brings the case to this court.

J. P. Usher, for plaintiff in error:

1. The petition specifies with particularity the alleged negligence of the defendant, both of omission and commission. There is no imputation of negligence in not keeping a flagman at the crossing. To show negligence by defendant, it seems it is compe-

tent to prove that it kept no flagman at the crossing. (63 N. Y. 522, and cases cited).

The admission of evidence of negligence not alleged in the petition, in addition to that specified, is error. (41 Mich. 433; 19 Kas. 542; 8 id. 658; 4 Sandf. 665.)

2. The testimony of the plaintiff, including that of all the witnesses in the cause, does not prove a cause of action. The plaintiff, by his own testimony, shows himself to have been negligent. His negligence was without qualification or mitigation. The defendant had the right to assume that the plaintiff had ordinary intelligence, and would conduct himself with ordinary prudence. (58 Ill. 300; 81 id. 450; 1 Dillon, 579.)

3. The plaintiff, by his own testimony, proves that he was negligent, and that his injuries occurred solely from his negligence, and that neither court nor jury has the right as against the defendant to assume that the testimony of the plaintiff is untrue. It is his own sworn admission of his conduct at the time of his injury. (22 Kas. 353; 20 Mich. 128.)

4. Plaintiff proves, beyond any question, that he did not take the slightest precaution to protect himself against injury. It is absolutely certain that he could have seen the train if he had looked in the right direction for it; and that he could have heard it if he had listened for it, and this independent of the alleged whistling and ringing of the bell. He admitted that his own wagon was so constructed and equipped as to make so much noise from the rattling of the boards upon it that he did not hear the approaching train of locomotive, tender, and eight or ten cars, and offers that as an excuse for not hearing. The fact that he had such an equipment should, in the exercise of due care, have compelled him to an increased watchfulness, a more vigilant use of his eyes, but instead of using them he says: "I looked straight ahead." It is true he says he looked to the west, and all he saw was a large pile of lumber, but he don't say that the lumber obstructed his view of the approaching train, or that he looked for it; and it is absolutely certain that he did not look for the train, for he swears in his cross-examination: "Wan't thinking about train." Giving plaintiff's testimony the construction most favorable for him, and it appears absolutely certain that he drove upon the track utterly heedless of any danger. If anything is settled in law, it is that a party about to cross a railroad track is bound to exercise reasonable care and diligence to avoid injury from approaching trains. (63 Ill. 178; 25 Mich. 470; 34 Iowa, 153; 33 Ind. 335–364; 105 Mass. 77; 28 Ohio St. 340; Thompson on Negligence, 401, 1212.)

5. Though the presumption of law is that a verdict is according to the facts proved, yet the testimony in this case is so overwhelmingly against the plaintiff, aside from the plaintiff's own showing, and so consistent with his showing, it is insisted that the tes-

timony ought to be considered in connection with plaintiff's for the purpose of showing that plaintiff was negligent, and that defendant was not negligent.

6. The burden of proof was upon the plaintiff to show the alleged negligence of defendant and his own care. This is not the case of a passenger injured while being transported, in which case, unless the plaintiff proves himself negligent, as, for instance, by thrusting his limbs or head out of the window, the law presumes him to have been exercising due care. The testimony shows beyond contradiction that the plaintiff's injury was caused by his negligence and want of care, and it equally fails to show any culpable negligence of the defendant; and unless a party can show, in cases of this kind, negligence of the defendant and due care on his part, he fails to maintain a case. Proof of one of these factors will not do. This case comes within the decision of this court, frequently announced, that if the plaintiff fails to make any proof of his cause of action, his judgment must be reversed. (21 Kas. 318; 23 id. 347; 18 id. 345; 1 id. 304; 7 id. 380; 10 id. 519.)

7. The court erred in its instruction to the jury. Here we have again the oft-complained of interpretation of the law, that if plaintiff's negligence was slight only, and defendant's was gross, plaintiff may recover. Again and again the court has been urged to discountenance ruling in this form. This court has declared that it does not adopt and has not adopted the doctrine of comparative negligence. (14 Kas. 66.) And yet it cannot be successfully contended that an instruction in the form given in this case does not lead the jury inevitably to compare the alleged or supposed negligence of the respective parties. The instruction is the same as that which the judges give in Illinois, where the rule of comparative negligence prevails, and by no other court is it tolerated where such rule does not prevail. The decisions of this court upon that subject are understood to be as in Illinois, and that the rule of comparative negligence prevails here. (Thompson on Negligence, 1172.)

Generally, it is believed that lawyers at home and abroad consider that this court has adopted this rule of comparative negligence. The learned and careful judge who tried this cause evidently intended to make this question so plain in his instruction that this court would not be at any loss to ascertain that he meant to instruct the jury to consider and compare the negligence of the parties at the time of the accident; and he goes on to declare and define what slight negligence is, and what is meant by his previous instruction in respect to such negligence—and the same as to gross negligence. The jury were told that "slight negligence is merely the failure to exercise great or extraordinary care;" and according to this instruction any degree of negligence occurring by the failure to exercise great or extraordinary care would be slight negli-

gence. And the jury would understand from this that extraordinary negligence, as defined by the court, would, within his former instruction, be such slight negligence only, and would not stand in the way of plaintiff's recovery. Then, as to the definition of gross negligence, which is declared to be "the want of slight diligence:" by this definition, the jury were left to infer that, if they found that there was only slight diligence and care in operating the train, the defendant was guilty of gross negligence—not ordinary negligence, but gross; and that, for the want of such slight diligence, the jury were to find there was such gross negligence as to make the company liable. The complaint we have to make of all this is this: The chronic errors which grow out of the expression that, if plaintiff's negligence is slight and defendant's gross, he must recover. It misleads and confuses. The rule is, and the one which in Pointer's case was announced to be the rule of this court, that if the plaintiff was guilty of negligence which contributed to the accident, he cannot recover.

8. There was no proof of negligence of the defendant. The alleged negligence of the defendant consisted in the rapid movement of the train without signals by bell or whistle. There is absolutely no evidence that the whistle was not blown or the bell rung. The most that can be said is that plaintiff has produced five witnesses who said that they did not hear the whistle sounded or the bell rung, but one of them said it was such a common occurrence that he did not notice it; while the defendant has affirmatively proved by five witnesses that the whistle was sounded more than three hundred yards before reaching the crossing, and the bell continuously rung thereafter until the collision. This affirmative proof must in all stages of the case overbear the negative testimony of the plaintiff. (Thompson on Negligence, 434, and note 7, and case cited in note.)

Campbell & Herald, for defendant in error.

There was nothing in the admission of evidence that the plaintiff in error had no flagman at the crossing, which prejudiced its rights. This evidence tendered no new issue, and would be proper under the general allegation of negligence in the petition. The court could have properly allowed an amendment to supply this special allegation on the trial, and the judgment should not be disturbed because there was no formal amendment actually made. (8 Kas. 247; 12 id. 449; 6 id. 206; 17 id. 166.)

There is no variance between the evidence and the material allegations of the petition. (19 Kas. 407; 10 id. 127; 70 Ill. 211.)

The special findings of the jury settle every question in the case in favor of the plaintiff, and as the defendant presented all the questions except the first two, and was present when the answers were returned by the jury, and made no objections to the form of

the findings, it cannot now claim the findings are not proper. The findings and verdict, having been approved by the court below, should stand. (21 Kas. 545; 14 id. 527; 19 id. 13; 17 id. 173; 15 id. 116; 16 id. 207; 10 id. 126.)

This case was tried by a fair and impartial jury, which heard all the witnesses testify, and viewed the locus in quo; and it was in their province to pass upon every question of fact submitted to them, and to draw conclusions from the entire evidence to sustain their verdict. (18 Kas. 529; 14 id. 53; 8 id. 111, 408; 16 id. 255; 45 N. Y. 450.) All questions of negligence are for the jury, and the jury found specially that the plaintiff was not guilty of contributory negligence. If the evidence in a case merely tends to show contributory negligence, it is for the jury to pass upon it. (14 Kas. 53; 39 N. Y. 68; 53 id. 654; 52 id. 439; 32 id. 603; 36 id. 133; 34 id. 626; 75 id. 332; 28 Wis. 487; 29 id. 21.)

The burden of proof was upon the defendant to show want of care in the plaintiff which contributed to the injury. This was a matter of defence, and plaintiff was not required to show this in order to make out a case against the defendant. (7 Kas. 388; 14 id. 53; 22 id. 50.)

The evidence shows that plaintiff was not acquainted with the locality, or with the time for trains to pass the crossing, and that he looked both ways before crossing the track, and looked to the west, the direction from which the cars were coming, but could not see the train by reason of lumber and freight cars. Defendant, well knowing the crowded condition of the street, the obstructions to view and the condition of the track, approached the crossing with its engine and train of eight cars at a very rapid and dangerous rate of speed without sounding a whistle or ringing a bell; and the fact that the train did approach the crossing without giving proper warning, at a point where the view was obstructed, was an assurance to plaintiff that there was no danger, as the crossing was not dangerous only when made so by defendant's trains. (39 N. Y. 397; 33 id. 33; 42 id. 231; 10 Kas. 438.)

Seven witnesses did not hear a bell or a whistle, until the instant of the collision, when it was too late to avoid the injury. Plaintiff began to pull his team around off the track the instant the warning was given. Two of the witnesses testified that they would have heard the bell if it had been rung. All this was proper evidence to show that the bell was not rung. (36 N. Y. 132; 52 id. 439.)

The fact that the train ran its length of four hundred and fifty feet after the brakes were applied, shows that the train was running at a very rapid and dangerous rate of speed. To cross the [illegible] of a city of over fifteen thousand inhabitants [illegible] would be gross negligence. (11 Kas. 649; 12 id. [illegible]; 67 Barb. 206; 84 Ill. 397.)

[illegible] people call out is excusable, because

others standing around did not hear. Nellan, who was nearer plaintiff than any other witness, did not hear anybody call. Phillips standing in an express wagon near to plaintiff, "heard one halloo, and immediately heard a crash." There was a great amount of noise and confusion, which made it impossible for plaintiff to hear. This will excuse him from hearing. (42 N. Y. S. C. 225; 67 Barb. 206; 47 N. Y. 403; 14 Kas. 53.)

The instructions are altogether more favorable to the defendant below than it has any right to expect. (22 Kas. 50.) The instructions as to negligence are in accordance with the rules laid down by this court. (5 Kas. 180; 14 id. 50; 10 id. 472; 11 id. 306.)

The opinion of the court was delivered by

HORTON, C. J.—Various reasons are urged by the counsel of the railway company for setting aside this verdict and judgment, but the main reasons alleged are, that from the undisputed facts in the case, the railway company was not negligent, and Richardson was negligent. These reasons are presented in different ways. It is said there was no proof of negligence of the company; that Richardson did not take the slightest precaution to protect himself, and that his injuries were all caused by his own want of care. The jury in the general verdict and the special findings decided otherwise. They found specially that the railway company was guilty of negligence in running at too great a rate of speed, and in failing to give proper signals of warning of the approach of the train to the crossing. They further found that Richardson was not guilty of any negligence contributing to his injury. We are therefore called upon to determine whether the general verdict and special findings were clearly against the evidence. In reference to the negligence of the company in failing to give signals of warning, the plaintiff and five witnesses who were present, testified they did not hear the whistle sounded or the bell rung until the instant of the collision. The plaintiff testified: "I looked to the west, and all I saw was a large pile of lumber; didn't hear bell, whistle, or anything. I looked ahead, and everything was all clear in the street. When I saw the train, the first thing [I did] I threw up my hands and pulled my team around, and the train whooped, whooped, whistled and struck about the same time." One of his witnesses stated, "He was ten or fifteen feet from the depot, and would have heard the signals if any had been given." Another said: "He was in a warehouse, two hundred feet west of Kansas Avenue and north of the track, with the door open to the track; that he stood in the door when the train passed; didn't notice any ringing of the bell when the train passed him, and didn't hear train whistle for station, but this was so common, might have failed to notice it." Other of these witnesses saw the

[illegible] were in positions to have heard the signals if [illegible] J. Robinson, who was a passenger in the car next to the rear one, testified "he didn't hear any alarm." On the part of the defendant the fireman testified: "He whistled for station [illegible] 300 or 400 yards west of the crossing; was ringing the bell when he came in; commenced opposite the tank, and kept it up till the train stopped; whistled again before reaching the crossing." The engineer testified: "Whistled for station; bell was ringing; commenced at water tank, and continued till we stopped." Turner said: "I heard train first whistle at water tank, 300 yards from crossing; the ringing of bell at switch, 100 yards west of crossing, and the bell rang until they whistled at corner of lumber yard, 75 or 80 feet from where the train struck." Four other witnesses stated they heard the whistle sounded 300 or 400 yards west of the crossing, and the bell ringing when the train came in. Now, though most of this evidence on the part of the plaintiff below was of a negative character, and the company gave positive evidence of a greater number of witnesses to contradict and overcome it, still there was a sufficient conflict of evidence to raise a question of fact, which the trial court was justified in submitting to the jury. The evidence against the giving of the signals was more, when carefully considered, than a mere "I did not hear." Some of these witnesses had their attention directed to the train as it came in; they were looking at the train, and were in a position to give heed to the presence or absence of the signals. The evidence conduced to prove that the signals were not properly and timely given; at least it was some evidence in that direction. The failure to give signals must be proved by witnesses that they did not hear them. When others testify that they gave them, and others testify that they did hear them, there is evidence on both sides to be considered. The evidence before the court being sufficient to be submitted to the jury, and to be considered by them, it was sufficient to sustain a finding that proper signals of warning of the approach of the train to the crossing were not given. As to the effect of the omission of timely signals, see L. L. and G. R. R. Co. v. Rice, 10 Kas. 426; Renwick v. N. Y. C. R. R. Co., 36 N. Y. 132.

We do not intend by the conclusion we have reached, to have it understood that the mere "I didn't hear" of several witnesses when met by a greater number of witnesses that signals were given, is proof that signals were not given. In this case we think there was some proof tending to show that the signals were not given, and that the jury had the right to pass upon the matter. This is all we decide now. As to the speed of the train, an examination of the evidence clearly shows the special finding of the jury that the train was running at the time of the injury fifteen miles per hour had ample support. Brown testified

that the train was running from fifteen to twenty miles an hour; Nellan said, "running fast." Phillips stated, "from ten to fifteen miles per hour." Lukins gave evidence that the train came in "unusually fast." Johnson said the "train was coming fast." The testimony of several witnesses was to the effect that the train ran its length, 450 feet, after the brakes were applied. Courtney, a locomotive engineer of eighteen years' experience, testified: "If the train had been going from eighteen to twenty miles an hour, it ought to have been stopped with the appliances used in fifty feet." Much of this evidence was contradicted by other witnesses of the company; but it is undeniably true that considerable evidence was given on both sides. The jury heard the witnesses, passed upon their credibility, and rendered a finding which has received the approval of the trial court. To us it is conclusive. It was said in Pacific R. R. Co. *v.* Houts, 12 Kas. 332: "For a company to run its train at the highest speed through the crowded streets of a city would be the grossest negligence; and the rate of speed at which those trains may be run is relative to the dangers attendant on such running." Upon the claim of counsel that Richardson was guilty of contributory negligence, and that the findings of the jury to the contrary are without proof, we have this to say: Where the evidence on such a question is doubtful, and the inferences to be drawn from the facts are uncertain, it is the province of the jury to decide.

The degree of diligence required of Richardson was such as a man of ordinary prudence would have exercised under similar circumstances. (L. L. and G. R. R. Co. *v.* Rice, supra. See Desmond *v.* Brown, 29 Iowa, 54.) As there was evidence that he looked west before crossing the track, saw only a pile of lumber, heard no bell or whistle, then looked ahead, saw the street clear, and as soon as he saw the train, pulled his team around, and as others as near as himself to the persons calling out for him to stop, did not hear the cries of "Stop!" and as there was evidence that the train was running at a too great rate of speed, and that no signals were properly given, there were such doubtful and qualifying circumstances attendant upon the case that the question of his negligence or want of care was a matter for the judgment of a jury, whose ordinary observation and experience of the conduct of men might be properly called into requisition. The case, as to the negligence of the injured party, is a very close one, and although it may be doubtful whether the findings thereon are absolutely correct, the facts against them are not so clear, nor is the jury so manifestly mistaken, that we feel at liberty to set the verdict aside. The law has said, in cases presenting the facts and surroundings of this one, that the judgment of twelve men, and not the opinion of one, two or three, shall control. (K. P. R. R. Co. *v.* Pointer, 14 Kas. 37; K. P. R. R. Co. *v.* Kunkel, 17 Kas. 145; P. P. and J. R. R. Co. *v.* Siltman, 88 Ill. 529.)

Error is also alleged in the admission of evidence that the company had no flagman at the crossing. It is argued that as the petition specified with particularity the acts of negligence of the company, both of omission and commission, and omitted any reference to the absence of the flagman, any evidence thereof was incompetent. We do not concur with counsel, who presses this point so persistently. The absence of the flagman at the crossing could be proved as one of the circumstances existing at the time and place of the accident. Such evidence was a part of the res gestæ, and tended to show to some extent the necessity of the timely signals of warning in approaching the crossing. If no flagman was at the crossing, the more important the signals to warn the parties about to cross. The proof of the absence of the flagman was not the negligence found by the jury, nor the actual basis of any recovery. It was only admitted as an incident or circumstance to establish the degree of negligence in running the train at a great rate of speed without signals. Therefore, in our view, it is not the case of a pleader averring in his petition one ground of action, and on the trial proving and recovering on another. The case of T. W. and W. R. R. Co. *v.* Foss, 88 Ill. 551, to which we are referred as conclusive against the admission of such evidence, is not parallel. There the only negligence averred was that the defendant carelessly ran its train upon which plaintiff was a passenger, yet, on the trial, a recovery was sought upon the ground that the defendant was negligent in failing to properly fence its track and providing steam brakes. The difference between the case cited and the one at bar is manifest without extended argument. In the one, the evidence offered tended to characterize the acts of negligence charged in the petition; in the other, a recovery was sought upon the proof of independent and distinct acts of negligence not alleged in the petition. It is further urged that the court erred in its instructions to the jury. It is conceded that the instructions were warranted under the previous decisions of this court; but it is contended that this court ought to discountenance its former rulings upon the degrees of negligence. Counsel alleges that this court has adopted what is generally understood as comparative negligence, and that the rule "misleads and confuses." The comments upon this question in the case of the K. P. R. R. Co. *v.* Pointer, 14 Kas. 37, and the thorough discussion of the subject of negligence by Mr. Justice Valentine in his concurring opinion in the case of Young *v.* U. P. R. R. Co., 19 Kas. 488, together with the numerous decisions of this court in the same direction, render unnecessary any discussion here.

Upon the whole record, we perceive no error prejudicial to the rights of the railway company, and therefore the judgment of the district court will be affirmed.

All the justices concurring.

See note, p. 123.

SHAW
v.
JEWETT.

(Advance Case, New York. October 4, 1881.)

In an action against a railroad company for an injury occasioned to plaintiff and to his horse and wagon which were run into by a passing train, the plaintiff testified that before attempting to cross defendant's track he had stopped, looked, and listened. The defendant adduced evidence to the contrary. The court instructed the jury that the plaintiff could not recover unless he established that he was using due care; that he did no act that contributed to the injury, nor omitted to take any precaution that would have prevented it. *Held*, that the instruction was proper.

In the above case the negligence charged upon the company defendant was failure to ring the bell of the engine. The evidence was contradictory whether the bell was rung or not. *Held*, that the question was for the jury.

In the above case the court instructed the jury that the plaintiff had a right to assume that the defendant would do its duty and ring a bell, adding further that the plaintiff, though he might make that assumption, was not relieved thereby from the duty on his part to vigilantly use his senses to avoid danger. *Held*, that the instruction as qualified was proper.

In the above case the defendant asked the court to instruct the jury that if they believed the plaintiff could have seen the train at distance enough from the track to have stopped his horse before reaching the track, his failure to see the train was negligence on his part, and he was not entitled to recover. The court refused the point, instructing the jury that the question was not alone whether the plaintiff could have seen the coming train at the indicated distance from the track, but whether when at that distance he looked and listened for it, and whether it was so plain that at that distance he could and would have seen it if he looked, and that his not seeing it was proof that he did not look. *Held*, that the instruction was proper.

In the above case the court told the jury that he would leave it to them whether or not the instinct of self-preservation would prevent a man from attempting to cross a railroad if he saw that the engine was bound to reach the point of crossing before he could cross, adding that it was for the jury to find whether plaintiff took the precautions of a prudent man before attempting to cross the track, and that the law exacted of him in such case a vigilant use of his senses to look both ways and to listen. *Held*, that the instruction was proper.

Semble, that where in a case such as the above the complaint contains no averment of lack of contributory negligence on plaintiff's part, and the answer does not aver the existence of such contributory negligence, the court is, notwithstanding, justified in admitting on the trial evidence on that point, and submitting it to the jury.

FOLGER, C. J.—This is a case of injury to person and property, from being run upon by a locomotive engine of the defendant. The defendant makes several points.

First.—This point presents the question of whether the evidence was such as to warrant the submission to the jury of the question of the freedom of the plaintiff from negligence on his part, contributing to the reception of the injury. It is noticeable that the pleadings do not present that issue. The complaint does not aver that the plaintiff was without negligence. The answer does not aver that he was negligent. The question first arises on a motion for a non-suit, put for one ground upon the claim that there is not sufficient evidence to go to the jury that the plaintiff was free from negligence contributing to the injury sustained by him. The motion was denied, but upon what reason does not appear. When the court charged the jury, it told them explicitly that the plaintiff could not recover unless he established that he was using due care; that he did no act that contributed to the injury, nor omitted to take any precautions that would have prevented it. It is probable, therefore, that the lack of an issue raised by the pleadings was not taken into consideration in disposing of this question at the Circuit, nor need it have been. For apart from that there was testimony in the case that made it incumbent upon the court to leave the case to the jury upon this question. The plaintiff testified that he stopped before crossing and looked and listened, that his wife got up and looked, that he saw and heard nothing, that he then went on a ways and stopped again and looked and listened, both ways, up and down the track, that he could see but a few feet on account of cars standing in the way. Indeed, his testimony, if believed, showed him cautious and careful in his approach to the tracks of the defendant, using more than once his sense of sight and that of hearing to warn of coming danger. Whether it was to be believed was for the jury to say. It was to be left to them for their judgment, whatever was the like testimony in conflict with it.

Second.—The second point made by the defendant is that the proof failed to show him negligent. The negligence charged against him is a failure to ring the bell of the engine. The plaintiff is positive in his testimony that there was no signal given, that he listened for one, but there was none by whistle or bell. Clapham testifies as positively and affirmatively to the same fact, and so does Bennet True; there were other witnesses to the contrary with equal or better means of knowing what was the fact, and with facilities as much on the alert to discern it. There was direct conflict in the testimony. It was for the jury to decide which was credible.

Third.—The court told the jury that the plaintiff had a right to assume that the defendant would do his duty and ring a bell. It is claimed that this was erroneous. When that portion of the charge was excepted to, the court supplemented it by saying to the jury that the plaintiff, though he might make that assumption, was not relieved thereby from the duty on his part to vigilantly use his senses to

avoid danger. The charge as thus restricted is sustainable upon the authority of this court. Voak *v.* N. C. Ry. Co., 75 N. Y. 320; Weber *v.* N. Y. C. and H. R. R. R. Co., 58 N. Y. 451; Terry *v.* Jewett, 78 N. Y. 338.

Fourth.—The court was asked to charge the jury that if they believed that the plaintiff could have seen the train at distance enough from the track to have stopped his horse before reaching the track, his failure to see the train was negligence on his part and he was not entitled to recover. The court refused the instruction and exception was taken. We think that the court did not err. The request was so couched that if the proposition folded up in it had been given as law to the jury, it would have laid down as the rule that the plaintiff was bound to see the train at the distance named if it were possible that it could be seen by any one from there. That is not the rule. The plaintiff is not bound to see. He is bound to make all reasonable effort to see that a careful, prudent man would make in like circumstances. He is not to provide any certain result. He is to make effort for a result that will give safety; such effort as caution, care, and prudence will dictate. In refusing the request the court added to its refusal further instructions to the jury that in substance set forth that rule. The question for the jury was not alone whether he could have seen the coming train at the indicated distance from the track, but whether when at that distance he looked and listened for it, and whether it was so plain that at that distance he could and would have seen it if he had looked; that his not seeing it was proof that he did not look. The request did not present that proposition.

Fifth.—The court said to the jury that of course the instinct of self-preservation would prevent a man from attempting to cross a railroad if he saw that the engine was bound to reach the point of crossing before he could pass. On this remark being excepted to, the court said that it would leave that to the jury whether it would or not. This authorized the jury to give to the plaintiff the benefit of a conclusion that such instinct exists and affects. We may not say that a jury is not absolutely to infer that a person in a dangerous place is not affected by the natural instinct of self-preservation. Reynolds *v.* N. Y. C. and H. R. R. R. Co., 58 N. Y. 248; Morrison *v.* The Same, 63 N. Y. 643; Weber *v.* The Same, supra. If a jury may infer it, it is not error for a court to say to them that they may. The inference that such instinct exists and moves within a person in given circumstances is not to countervail proof, nor to take the place of proof and to supply the lack of it, perhaps, not to eke out to a verdict scanty or flimsy proof. And against such a result the jury was in this case guarded by the court, for in connection with its remark it told the jury to seek whether the plaintiff took the precaution of a prudent man before attempting to cross the track, and that the law exacted of him, before attempting

to cross, a vigilant use of his senses, to look both ways and to listen.

These remarks cover the positions taken by counsel in this court. The case is one resting on conflicting testimony. It was fairly left to the jury. They have solved the doubts and conflict in favor of the plaintiff. By their verdict we must abide. The judgment should be affirmed.

All concur.

See note, p. 123.

P. C. AND ST. L. R. R. Co.

v.

WRIGHT, EX'R.

(*Advance Case, Indiana. April* 6, 1883.)

Negligence and contributory negligence are both ordinarily questions of fact which are for the jury.

In an action against a railroad company for running over and killing a person who was driving across the track of the company, the court instructed the jury as follows: If you find that defendant's train caused A. B's death, that it was on the day of the accident behind time and running rapidly to make up the same, that the track on which said train was running was obscured from sight of the highway along which A. B. was driving by a cut and other obstructions; if you find that the team in which A. B. was driving stopped before reaching the track, and that the driver looked and listened and could not see nor hear the approaching train, and then drove on not hearing nor seeing said train till it was too late to avoid the accident; if you further find that said train was running on a down grade, that the employees of the defendant failed to give any warning until too late to avoid the collision, and that A. B's death resulted from such collision, you must find for the plaintiff. *Held*, that there being other facts in the case the instruction was imperfect and indefinite, and consequently erroneous. *Held*, further, assuming that all the facts in the case were set forth in the instruction, that it was erroneous because the question of both the defendant's negligence and the plaintiff's contributory negligence should have been left to the jury.

WOODS, J.—Action for damages by the appellee against the appellant for the negligent killing of Margaret Wright. Some of the questions in the record are decided in the case of the same appellant against Morgan Wright (No. 8673 this term), which arose out of the same occurrence. It is claimed in this case, however, that the Circuit Court erred in giving and refusing instructions asked by the respective parties. At the instance of the appellee, the court gave the following: 1. If you believe from the evidence that the locomotive and train of cars running upon the line of road mentioned in the complaint, and operated by the em-

ployees of defendant, caused the death of Margaret Wright, was on the day of such accident behind time, and was running at an unusual rate of speed at the time of the accident for the purpose of making up time; and you further find that said road extending in the direction from which said train was coming, north of the crossing of the public highway was located in a cut and obscured by other obstructions which concealed said train from the view of persons driving along said highway and approaching said railroad; and you further find that the team to which was attached the wagon in which decedent and John Wright, the driver, was riding, was stopped at a short distance before it reached the crossing, and decedent and said John Wright looked and listened for the train in the direction in which it was coming and could not see or hear it, and you further find that they continued to look and listen for the train after the team was started on towards the crossing, until they reached the track, and they failed to see or hear the same so as to avoid the accident; and you further find that said locomotive and train were running on a down grade, and that the employees of the defendant on said locomotive and train failed to give any signal of warning until said team was upon or crossing upon said track, and too late to prevent the collision of the train with the wagon, and that the death resulted from said collision, then your finding should be for the plaintiff.

This instruction is, in our opinion, justly subject to some of the objections made to it. It is claimed that there were other facts and circumstances in evidence bearing on the question of liability which are not referred to, and that in some respects the references made are too indefinite and calculated to mislead; but the more important and fundamental consideration is, that both in respect to the negligence of the defendant and the contributory fault of the deceased, the instruction invaded the proper province of the jury. Upon the hypothesis that the evidence showed the facts stated, and no other facts than those stated in the instruction, the case was not such as to enable the court to say conclusively, as matter of law, that the plaintiff was entitled to recover.

It still remained to be determined by inference from the facts supposed whether the defendant's servants had been guilty of any negligence or want of care which caused the injury complained of and also whether the deceased, by any fault of hers or failure to exercise ordinary and proper care under the circumstances, had contributed to the unhappy result.

There have been cases, and cases may be supposed upon the facts of which the court could declare, as a conclusive legal inference, what the verdict should be; but upon the facts supposed in this instruction it cannot be done, for the manifest reason that it is left undetermined whether the usual rate of speed of the defendant's train, and the failure of the defendant's servants to give

warning of the train's approach, under the circumstances, constituted negligence, and if so, whether that negligence caused the injury; and further, whether the precautions supposed to have been taken by the deceased and the driver of the team were, under the circumstances, such as would, and ought to, have been taken in the exercise of ordinary prudence. In such a case as the instruction supposes, these are inquiries which are vital to the rights and liabilities of the parties, and which should have been submitted to the jury to be answered in the light of all relevant evidences.

The third instruction given at the request of the appellee contains an accurate statement of the law in this respect, but it does not cure the error of the first. It has been repeatedly decided that a bad instruction is not cured by the giving of a good one.

While the evidence in the case tended to show that it was impracticable for one upon the highway to have seen the approaching train until he had come upon or very near the railroad track at the crossing, it is claimed, and is perhaps true, that from the point of the crossing the train might have been seen for a great distance; and upon this view of the facts the appellant insists that it was the duty of the driver with whom the deceased was riding to have left his team and gone upon the track to see that there was no danger before undertaking to drive the team across. It cannot be said, however, as matter of law that the driver should have taken this precaution. It was a question of fact in the light of all the circumstances, whether reasonable prudence required this course, and whether the failure to take it was negligence.

If by reason of wind, rain, or for other cause it had been impossible to hear the bell or whistle of the locomotive, it might or ought, perhaps, to be deemed to have been imprudent and careless to drive upon the crossing without in some way making sure that it was safe; but whether the driver should have left his team, for this purpose may have depended on other circumstances, as for instance the character of the team itself, and the risk incurred in leaving it.

In whatever light the subject is considered, the reasonable solution of such inquiries is found in the proposition that negligence is ordinarily a question of fact.

There is no other question in the record which we deem it necessary to consider.

Judgment reversed with costs, and with instructions to grant a new trial.

See note, p. 128.

PHILADELPHIA AND READING R. R. CO.

v.

TROUTMAN.

(*Advance Case, Pennsylvania. March* 3, 1882.)

Where a person crosses a railroad track by a common and well-known foot-path, used by the public for many years, without let or hindrance on the part of the employees of the railroad company, he cannot be regarded as a trespasser.

A weak-minded girl of between twelve and thirteen years of age started upon a footpath such as has been above described, which lay within the limits of a village of about fifty houses. Upon approaching the tracks, which were three in number, she stepped upon the first track, on observing the approach of an engine on the third track. The engine stopped directly abreast of her, and seeing no approaching train, she started to walk down the track on which she had been standing, and so around the engine. While engaged in so doing, she was struck and injured by a train of stone cars, which had been detached from the engine above spoken of about three-quarters of a mile above, and which having attained a rate of speed of fifteen or eighteen miles an hour, had been by a flying switch turned from the third track upon the track on which the girl was walking only about one hundred and fifty feet from the point where she was struck. There was no whistle blown or alarm of any kind given to the girl. The engineer of the standing engine, the only one of the employees of the railroad company who saw her, did not attempt to save her, because, as he testified, he did not observe that she was upon the track. Suit having been brought by the girl against the railroad company to recover damages for the injury done her:

Held, That the evidence disclosed negligence on the part of the company's employees.

Held, Further, that it disclosed no contributory negligence on the part of the plaintiff, or at least certainly no such contributory negligence as would require the Court peremptorily to instruct the jury that the plaintiff was not entitled to recover.

ERROR to the Common Pleas of Berks County.

Case, by Alice Troutman, by her next friend, Samuel Shoup, against the Philadelphia and Reading R. R. Co., to recover damages for an injury to the plaintiff, caused by the alleged negligence of the defendant's servants. Plea, not guilty.

On the trial, before SASSAMAN, J., the following facts appeared: The plaintiff, who was a weak-minded girl of twelve and a half years, was living as a servant with Samuel Shoup, near Stouchburg. At the time of the accident, she had been sent on an errand to the grocery store at Sheridan, a village on the line of the defendant's railway, consisting of about fifty houses, located mostly on the south side of the railroad track, which at that place runs east and west. The public road from Newmantown to Stouchburg runs on

the south side of the railroad, then passes over the track in and between the hotel and the station at Sheridan. About one hundred feet from this wagon-road there is a footpath leading from the store at Sheridan to Kaufman's office and furnace, which, with five or six houses, lies on the north side of the track. This path is a well-beaten track which has been in use many years by the public, and especially by Kaufman's workingmen, as a short cut from the Stouchburg road to the Sheridan station and post-office. When the plaintiff came to this path she walked down it to the railroad, and when she reached the track in the path, she stopped and stood still until an engine which was coming down the main track, fifty to sixty feet away, stopped. She then went a short distance, looked up and down the track, and seeing nothing but the engine, stepped on the first track, which was called the Kaufman siding, and began to walk down the track, intending to go around the engine, which had stopped on the main track at the crossing of the public road. While she was walking towards the engine three six-wheeled cars loaded with stone, which had been disconnected from the engine about three-fourths of a mile above the station, and had been running on a flying switch upon the siding upon which the plaintiff was walking, came up behind her, and struck her, passing over her arm and mangling it so much as to require amputation. Plaintiff testified that she heard neither whistle nor alarm bell, and that no one called to her to warn her of her danger. It appeared that neither the conductor nor the brakeman saw the child, and the engineer who did see her gave her no warning because he did not see that she was upon the track. The place where she was struck was about one hundred and fifty-nine feet from the switch, and the cars were running down the siding at the rate of ten to fifteen miles an hour. At the crossing of the railroad the footpath ascends three or four feet up to the track, and from that point the signal tower, which was about three-fourths of a mile from the station, could not be seen by an adult, much less by a child. It was in evidence that the cars were running on the siding under bad brakes, and that the employees of the road were accustomed to make this flying switch once a day every day, and that it was made on this day just as they always made it.

The defendants requested the Court below to charge, inter alia, as follows:

(2) There is no evidence of negligence in this case on the part of the defendants. Answer. We fail to discover any direct and positive evidence of negligence, except such as may be inferred from all the evidence.

(4) The plaintiff in this case was a trespasser, and therefore guilty of contributory negligence, and the verdict must be for the defendant. Answer. The plaintiff was a trespasser, but if the defendant suffered such repetition, of trespass, which led the child

over the path crossing, the fact of her being there would negative the liability incurred, by the negligence of her fault.

The Court charged the jury, inter alia, as follows:

"If, under the circumstances, they could have used more care, then of course the company could be held liable in damages for the injury to the girl. Because, although the girl would be a trespasser (P. R. Co. *v.* Lewis, 29 P. F. S. 33 et seq.), it would seem from long use there was a permission to use the path, and if this was not stopped, then this girl could have taken for granted that this was a place to go over the railroad, and her act would be a permissive trespass, which the company would be estopped from setting up as trespass per se, and this would give such trespasser some advantage in an issue of this kind. When the company in a notorious and open way allows people to go over and make a well-beaten track over their track, this would be a palliating circumstance of the trespass. If the place was unfrequented, such trespasser could not be allowed to recover. We would be far from saying that a mere footpath would be the same as a public crossing. Permissive footpaths would take away the presumption of trespass. The trespasser in such a place would not be that kind of an intruder which he would be under other circumstances.

"This case presents a pretty narrow point. It is hard to say how much discretion this little girl, twelve and a half years old, should have used. She is so near the border of presumed years of discretion that it is difficult for us to determine whether she was bound to know what she was doing or what it was necessary for her to do. She watched the engine, but it seems did not look for the cars. If the brakeman had seen the obstruction, he would have had to put the brakes on, especially as it was a little girl. If she had been a grown person, she would have had to stop and look around before venturing over the track. The legal presumption is always that persons will always use their senses to get out of the way. If it would appear that a person had lost presence of mind, and the employees knew it and carelessly ran over, the company is liable. Where employees did not see it, it would be only an accident. If the cars had been switched off and had no appliances, and ran recklessly over such a beaten track, then the jury might infer negligence in the company."

Verdict and judgment for the plaintiff. The defendant thereupon took this writ, assigning for error the answers to the points presented and the portion of the charge of the Court quoted above.

Jeff. Snyder and Geo. F. Baer for plaintiffs in error.

The plaintiff in this case was a child over twelve years of age. She was at years of discretion in contemplation of law, and was therefore bound, as an adult person under similar circumstances would be, to stop, look, and listen before going upon the track. As she did not do this, she was clearly guilty of contributory negligence.

There is not a particle of evidence that she had so lost her presence of mind as to come within any modification of so well-established a rule. There was no negligence on the part of the defendants, for they had the undoubted right to the use of their switch. And even assuming that she heard neither whistle nor any alarm, it is submitted that, after sighting the engine, she had such notice of the approach of a train of cars as to make it her duty to keep off the track. The accident was directly attributable to her own want of care, and neither the defective brakes nor the so-called high rate of speed of the cars were in any way the cause of it. As the use of the footpath which plaintiff contends partook of the nature of a public crossing, there is not the slightest evidence that the company ever assented to such use of it. But even if plaintiff's trespass were permissive it is submitted that that question is not in the case, for the locus in quo of the accident was several paces below the footpath crossing. That she was guilty of contributory negligence is clear, for it is well settled that except at street crossings, where the public has a right of way, a railroad company has the right to a clear track, and it owes no duty to trespassers, whether they be adults, minors, or children of tender years. Cauley *v.* R. R. Co., 9 Weekly Notes, 505; Duff *v.* R. R. Co., Id. 504; R. R. Co. *v.* Henrice, 11 Norris, 431; R. R. Co. *v.* Hummel, 8 Wr. 375.

W. H. Livinggood, for defendant in error.

Where a person, without negligence on his part, gets into a position of danger, he is not responsible if he make a mistake in escaping therefrom. Pennsylvania R. R. Co. *v.* Wenner, 8 Norris, 59.

The child did not see the new danger coming in upon her from behind, and had no time to decide upon a course of action. No warning was given of the approach of the cars upon the siding. The engine had passed her, and it is asking too much to say that it was negligence, as a matter of law, not to have anticipated that detached cars were following in the rear of the train that had just passed. But there was gross negligence on the part of the defendnts, for the use of a flying switch is negligence per se. Brown *v.* N. Y. C. R. R., 32 N. Y. 597; Kay *v.* P. and R. R. Co., 15 Smith, 274.

It was the engineer's duty to have been on the lookout while this flying switch was being made, and to have warned the child of the danger. Reeves *v.* R. R. Co., 6 Casey, 461. (1) There was gross negligence in obstructing the crossing. P. R. R. Co. *v.* Spevin, 11 Wright, 204. (2) In the high rate of speed of the cars. Reeves *v.* R. R. Co., 6 Casey, 454. (3) In the absence of any signal of approach or any alarm by the moving cars. Brown *v.* N. Y. C. R. R., 37 N. Y. 597. And in having defective brakes. North Penn. R. R. Co. *v.* Kirk, 9 Norris, 19.

The footpath was as well defined as the public road, and it was

used by the general public. But even if it were not a public crossing, the company allowed the public to use it, and trespasses of the public for twenty years had ripened into a right by sufferance. Kay *v.* P. and R. R. Co., 15 Smith, 273.

Duties grow out of circumstances, and where from any good reason a person may be expected to cross a railroad, the same rules apply as in case of a highway crossing. Shearman & Redfield on Negligence, sec. 482.

Under the circumstances the rate of speed was incompatible with public safety. P. R. R. Co. *v.* Lewis, 29 Smith, 33.

Whether the conduct of those who were in charge of the cars was negligent or not was properly for the jury. P. R. R. *v.* Dook, 2 Smith, 381; Smith *v.* O'Connor, 12 Wright, 218.

April 10, 1882. The Court.—Whilst there were many exceptions taken to the charge and rulings of the Court below, the substance of them all may be considered in the disposition of the defendant's second and fourth points. These points were: (1) That "there was no evidence of negligence in the case on part of the defendants." (2) "The plaintiff was a trespasser, and therefore guilty of contributory negligence." Both these points were refused.

The case turns mainly upon the last recited, or fourth point. The place where the accident occurred was not in the open country, but in a small village of about fifty houses. On the north side of the railroad were a furnace and four or five dwellings; on the south, the depot, a hotel, store, etc. At this point, one hundred and six feet from the public road crossing, there was an old and well-used foot-path leading over the railroad, and it was while attempting to cross by this path that the plaintiff, a child of twelve years of age, was injured.

The Court below thought that a person using this path to pass over the defendant's tracks could not be regarded as a trespasser. We can discover nothing wrong in this conclusion. If this was a common and well-known foot-path, used by the public for many years, it must certainly have been well-known to the employees and officers of this company, and if, without let or hindrance, the use of it was permitted to persons desiring to cross and re-cross the roadway, we cannot see how one thus using it could be treated as a trespasser. Certainly, if a private person had so permitted his land to be used, an action of trespass by him against one passing over it, without previous notice or prohibition, would meet with little favor. But we cannot, in this respect, clothe corporations with powers superior to those of natural persons. Indeed, if we regard the case of the Pennsylvania Railroad Company *v.* Lewis (29 P. F. S. 33) as authority, even a trespasser may have some rights which a railroad company is bound to respect, à fortiori as to a person who is on the roadway by permission. To hold otherwise would be but

a poor comment upon our civilization and upon the wisdom of this Court.

As to the negligence of the employees having charge of the cars by which the injury complained of was done, there can be from the evidence no doubt. A more perfect trap for the destruction of any one, more especially for a child of tender years and weak intellect, could scarcely have been devised. The train designed for the flying switch is cut from the engine some three-quarters of a mile from, and out of sight of, the crossing; the locomotive is run forward, and stationed directly across the foot-path; the train comes down the track at a rapid rate, and when within one hundred and fifty-nine feet of the place where the child stood, by some sleight of hand, unknown to persons not skilled in the management of railroads, and without warning of any kind, it is suddenly turned on to the switch. When, in addition to this, we understand that the hands upon and about this train paid no attention whatever to the track upon which it was running, and that the engineer actually saw the child in the act of approaching, and did nothing to warn her of the coming danger, we cannot understand how any one can have the face to say that there was no negligence on part of those having charge of this train, or, indeed, that they were not guilty of very gross negligence.

As to the plaintiff's contributory negligence, we can find no evidence of it; certainly not of that conclusive kind which would require the Court to take the question from the jury. The plaintiff herself testified as follows: "When I got to the path I walked down towards the road. When I came to the track in the path I stopped. Then the engine came down. I went a piece down towards the road and looked up and down the road, and saw nothing but the engine. I think I took three steps. I was on the first track and the engine was on the third track. When I got to the track on the path, the engine was coming down on the third track, about fifty or sixty feet away. Then I stood still until the engine stopped. Then I walked down the track about three paces to walk around the engine. I know that the engine stood on the path, but how much of the engine stood on the path I don't know." It is true that John North, an engineer of the company defendant, but not the one having charge of the engine then on duty, says he saw her when she first stepped on the siding, and that she remained upon it two or three minutes before she was struck. But in this there is no material contradiction of her testimony. In events of this kind time is at best but a mere matter of guess-work, and she was as likely to be correct as he. Be this, however, as it may, it is no serious reflection on the prudence of a child of her age that she waited and watched until the locomotive had stopped, and until, so far as she could see, the track was entirely clear, even though standing upon the siding. To an ordinary observer, not aware that the

flying switch movement was about to be executed, her position was one of no danger.

North says: "If the conductor had not turned the switch, the girl would not have been hurt." Doubtless he, with all his skill in railway management, did not think she was in danger, otherwise we can hardly understand why he did not attempt her rescue. Even had she seen the train moving upon the main track, how could she know that it would not continue on that track? How could this child tell that by a single motion of a lever the cars would be upon her within a space of time measured by some ten or fifteen seconds? This would be too much to ask of a grown person, much more of one of such tender years. The charge of the learned Judge of the Court below, when considered as a whole, and not dislocated as we find it in the assignments, is a fair one, and as favorable to the defendant as he had reason to expect; therefore, without further discussion, we refuse to sustain the exceptions to it.

The judgment is affirmed.

Opinion by Gordon, J.

The nine cases immediately preceding this note turn upon the very important question of the obligation of railroad companies to the public at railway crossings. The aim of this note is to illustrate these cases by the collection of the chief authorities bearing on the same or analogous points; but no attempt will be made to consider the question as complicated by the contributory negligence of those persons traversing the track. It is well settled, as a general principle, that a railroad company is bound to use every reasonable precaution to avoid injury to the public at railway crossings, although it is not incumbent upon them to use every possible one. Weber v. N. Y. Central and Hudson R. R. Co., 58 N. Y. 451; Balt., etc., R. R. Co. v. Breinig, 25 Md. 378; Cleveland, etc., R. R. Co. v. Terry, 8 Ohio St. 570; Johnson v. Chicago and N. W. R. R. Co., 1 Am. and Eng. R. R. Cas. 155. It is therefore bound to furnish efficient brakes and such other well-tested improvements and inventions as may contribute to safety. Smith v. N. Y. and H. R. R. Co., 19 N. Y. 127; Costello v. Syracuse, B. and N. Y. R. R. Co., 65 Barb. 92. See note to Daugherty v. N. Y., L. E. and W. R. R. Co., Am. and Eng. R. R. Cas. post, p. 145.

In the absence of specific statutory provision a train should, on approaching a crossing, give such usual and customary warnings of its approach as are required in the prudent and skilful management of trains. Continental Improvement Co. v. Stead, 95 U. S. 161; Reeves v. Del., L. and W. R. R. Co., 30 Pa. St. 454; Bilbee v. London, etc., Ry. Co., 1 C. B. (N. S.) 584; Cliff v. Midland Ry. Co., L. R., 5 Q. B. 261; N. J. Transportation Co. v. West, 33 N. J. L. 91; North Car. R. R. Co. v. State, 54 Md. 113. And it is for the jury to say, under the instruction of the court, what warnings are usual and necessary under the circumstances. Thomas v. Delaware, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 643; Black v. Burlington, C. R. and M. R. R. Co., 38 Iowa, 515; Galena and C. V. R. R. Co. v. Dill, 22 Ill. 264; Bauer v. Kansas Pacific R. R. Co., 69 Mo. 219; Paducah and M. R. R. Co. v. Hoehl, 12 Bush. 41; Cadell v. N. Y. Cent. and Hud. River R. R. Co., 64 N. Y. 535; Ellis v. Gt. Western R. R. Co., L. R. 9, C. P. 551; P. C. and St. L. R. R. Co. v. Wright Executor (supra); Kansas Pac. R. R. Co. v. Richardson (infra).

In some cases, it is true, it has been held or intimated that a train is bound, independent of any statute, either to ring or whistle before passing a cross-

ing, and that a failure to perform this duty will constitute negligence per se. Phila., Wilm. & Balt. R. R. Co. v. Stinger, 78 Pa. St. 219; Zimmerman v. Hannibal & St. Jo. R. R. Co., 2 Am. & Eng. R. R. Cas. 181. But the great weight of authority is to the contrary. Brown v. Milwaukee and St. Paul R. R. Co., 22 Minn. 165; Northern Central R. R. Co. v. State Co. Use (supra).

It has been held that in no event are the employees of a railroad company bound to give any warning of the approach of a train to a bridge over which a highway passes. Favor v. Boston & L. R. R. Co., 114 Mass. 350.

Where there is no express statutory provision a railroad company is not bound to place a flagman or to provide gates at a railway crossing, unless indeed the crossing be so dangerous that prudence would suggest the taking of such precautions. Welsch v. Hannibal & St. Jo. R. R. Co. supra, p. 75; Kelly v. St. Paul, Minn. & Manitoba R. R. Co. infra, p. 93; Kansas Pac. R. R. Co. v. Richardson, infra, p. 96; Grippen v. N. Y. Cent. & H. R. R. R. Co., 40 N. Y. 34; Culhane v. Same, 60 N. Y. 133; McGrath v. Same, 63 N. Y. 522; Commonwealth v. Boston & W. R. R. Co., 101 Mass. 201; Phila. & Reading R. R. Co. v. Kelleps, 88 Pa. St. 405; Del., Lack. & W. R. R. Co. v. Toffey, 9 Vroom, 525; State v. Phila., W. & B. R. R. Co., 47 Md. 76; Stapley v. London, B. & S. C. R. R. Co., L. R., 1 Exch. 21; Cliff v. Midland R. R. Co. L. R., 5 Q. B. 258; Pollock v. Eastern R. R. Co., 124 Mass. 158.

There is a strong disinclination on the part of the courts to leave to a jury the determination of the obligations of the company in this respect. Dyer v. Erie Ry. Co., 71 N. Y. 228; Weber v. N. Y. Cent. & H. R. R. R. Co., 58 N. Y. 451.

But it is submitted that this is the proper course for the courts to pursue. Eaton v. Fitchburg R. R. Co., 129 Mass. 364; Penna. R. R. Co. v. Kelleps, 88 Pa. St. 405.

Where a company has undertaken to post a flagman, he is bound to stay at his post, and for a failure on his part to do so the company will be held liable. St. Louis, Vand. & T. H. R. R. Co. v. Dunn, 78 Ill. 197; Kissinger v. N. Y. & H. R. R. R. Co., 56 N. Y. 538; Dolan v. Del. & Hud. Canal Co., 71 N. Y. 285; Casey v. N. Y. Cent. & Hud. River R. R. Co., 78 N. Y. 518.

Of course where the company have once posted a flagman at a crossing, they have no right suddenly to remove him, without giving to the public due notice of their intention. Pittsburg, etc., R. R. Co. v. Junat, 3 Am. and Eng. R. R. Cas. 502.

In regard to the speed of trains, it seems that a railroad company is bound to so regulate it as to afford reasonable security to the public. The rate of speed which is allowable depends of course upon the locality. In towns and villages trains must be run far more slowly than in the open country, and this is so even if the matter be not regulated by statute. Penna. R. R. Co. v. Lewis, 79 Pa. St. 33; Pacific R. R. Co. v. Houts, 12 Kans. 328; Kansas Pac. R. R. Co. v. Ward, 4 Col. 30; Meyer v. Midland Pac. R. R. Co., 2 Neb. 319; Cordell v. N. Y. C. & H. R. R. R. Co., 70 N. Y. 119; Daley v. Norwich & W. R. Co., 26 Conn. 591; Chicago & A. R. Co. v. Engle, 84 Ill. 397; Lafayette & I. R. Co. v. Adams, 26 Md. 76.

No one rate of speed, however, amounts to negligence per se. Chicago, Boston & Q. R. R. Co. v. Harwood, 80 Ill. 88; Maker v. Atlantic & P. R. Co., 64 Mo. 267; McKonkey v. C., B. & Q. R. R. Co., 40 Iowa, 205; Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537; Grows v. Me. Central R. R. Co., 67 Me. 100; Bemis v. Conn. & P. R. Co., 42 Vt. 375; Cohen v. Eureka & P. R. Co., 14 Nev. 376; Warner v. N. Y. Cent. R. R. Co., 44 N. Y. 465.

Wherever the speed is great, the fact is submitted to the jury together with the attendant circumstances, and from it they may or may not infer negligence on the part of the company. Terre Haute & Indianapolis R. R. Co. v. Clark, infra, p. 84; Tony v. Jewett, 78 N. Y. 338; Kelly v. St. Paul, Minn. & Manitoba R. R. Co., infra, p. 93; Black v. Burlington, etc., R. R. Co., 38 Iowa,

515; Indianapolis, etc., R. R. Co. v. Staples, 62 Ill. 313; Wilds v. Hudson River R. R. Co., 29 N. Y. 315; Massoth v. Delaware, etc., Canal Co., 64 N. Y. 524; Reeves v. Del. & Hudson Canal Co., 30 Pa. St. 454.

The management of railroad trains when approaching crossings may be and often is regulated by statute. Western Union R. R. Co. v. Fulton, 64 Ill. 271; Pitts., Conn. & St. Louis R. R. Co. v. Brown, 67 Ind. 45.

Municipalities are also sometimes empowered by the Legislature to pass advances regulating the management of trains within their corporate limits. These advances when passed have precisely the effect of statutes. Balt. & Ohio R. R. Co. v. State, 29 Md. 252; Massoth v. Del. & Hud. Canal Co., 64 N. Y. 524; St. Louis & S. E. R. Co. v. Mathias, 50 Md. 65.

Many statutes or ordinances passed as above mentioned require the company to sound a whistle or ring a bell invariably before approaching a crossing, and if the company fail to observe this regulation they will be liable. Wright v. Boston, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 121; Voak v. Northern Cent. R. R. Co., 75 N. Y. 320; Pollock v. Eastern R. R. Co., 124 Mass. 158; Memphis & C. R. Co. v. Copeland, 61 Ala. 376; St. Louis & S. E. R. R. Co. v. Mathias, 50 Md. 65; Peoria, Pa. I. R. Co. v. Siltman, 88 Ill. 529; Chicago & N. E. R. R. Co. v. Miller, infra, p. 89. See Hodges v. St. Louis, etc., R. R. Co., 2 Am. and Eng. R. R. Cas. 190; Shaw v. Jewett, infra, p. 111.

Other statutes or ordinances require the posting of flagmen or the maintenance of gates at crossings, and if the railroad company fails in its duty in this respect it will also be held liable. Stapley v. London, Brighton & S. C. R. R. Co., L. R., 1 Exch. 21; Wanless v. N. E. R. R. Co., L. R., 6 Q. B. 481.

Sometimes railroad companies are expressly restrained from running their trains at any more than a given rate of speed. If in violation of their duty they run them faster, they are held liable. St. Louis, Va. T. H. R. R. Co. v. Dunn, 78 Ill. 197; Chicago & A. R. Co. v. Becker, 84 Ill. 483; St. Louis & S. E. R. Co. v. Mathias, 50 Ind. 65; Haas v. Chicago & N. W. R. R. Co., 41 Wisc. 44; Liddy v. St. Louis R. R. Co., 40 Mo. 506; Balt. City Pass. Ry. Co. v. McDonnell, 43 Md. 534; Massoth v. Del. & Hud. Canal Co., 64 N. Y. 524.

But it must clearly appear that the failure of the company to obey the directions of the statute or ordinance was the proximate cause of the injury complained of, otherwise the company cannot be held liable. Cordell v. N. Y. Central & Hudson River R. R. Co., 70 N. Y. 119; Briggs v. N. Y. Central & H. R. R. R. Co., 72 N. Y. 26; Chicago R. R. Co. v. Notzki, 66 Ill. 455; Fletcher v. Atlantic, etc., R. R. Co., 64 Mo. 484; Penna. R. Co. v. Hensil, supra, 8 p.

There are certain acts upon the part of those in charge of railway trains at crossings which are deemed to amount to negligence per se. Among these the following are of most frequent occurrence: The use of the "running" or "flying" switch without giving full warning to the public not to attempt to cross the track. Brown v. N. Y., etc., R. R. Co., 32 N. Y. 597; Sutton v. N. Y., etc., R. Co., 66 N. Y. 243; French v. Taunton, etc., R. Co., 116 Mass. 537; Hinckley v. Cape Cod R. R. Co., 120 Mass. 257; Chicago, etc., R. R. Co. v. Garvey, 58 Ill. 83; Butler v. Milwaukee, etc., R. R. Co., 28 Wisc. 487; Illinois, etc., R. R. Co. v. Hammer, 72 Ill. 347; Illinois Cent. R. R. Co. v. Baches, 55 Ill. 379; Phila. & Reading R. R. Co. v. Troutman, supra, p. 117.

The backing of a train or the pushing of it before the engine without first using all imaginable care to warn the public of the danger. Bailey v. New Haven, etc., R. R. Co., 107 Mass. 496; Kennedy v. North. Mo. R. R. Co., 36 Mo. 351; Hathaway v. Toledo, etc., R. R. Co., 46 Md. 25; Leavenworth, etc., R. R. Co. v. Rice, 10 Kans. 426; Kansas Pacific R. R. Co. v. Proctor, 14 Kans. 37; McWilliams v. Detroit Cent. M. Co., 31 Mich. 247; Robinson v. Western Pac. R. Co., 48 Cal. 409.

The mere whistling of an engine attached to a long train of freight cars on a track near a crossing is not sufficient warning to the public of an intention

to back the train. Linfield v. Old Colony R. R. Co., 10 Cush. 564; Chicago, etc., R. R. Co. v. Garvey, 58 Ill. 85; Illinois, etc., R. R. Co. v. Ebert, 74 Ill. 399; Eaton v. Erie R. R. Co., 51 N. Y. 544; Maginnis v. N. Y., etc., R. R. Co., 52 N. Y. 215; McGovern v. N. Y., etc., R. R. Co., 67 N. Y. 417.

CINCINNATI, WABASH AND MICHIGAN R. R. Co.

v.

PETERS.

(*Advance Case, Indiana. April 8d*, 1882.)

In an action by a passenger against a railroad company to recover damages for injuries alleged to have been occasioned by the negligence of the company, defendant, the plaintiff must in his complaint charge the company, defendant, with negligence, and must also aver that he himself was without fault or negligence, or state such facts as will clearly show that he was without fault or negligence in the premises.

In an action by a passenger against a railroad company to recover damages for injuries done him, the complaint averred in substance that, upon the arrival of the train upon which plaintiff was a passenger at the station which was his destination, said train slackened in speed so that plaintiff could have alighted safely had there been a platform or other suitable place prepared for passengers to step on; that the night was dark, the wind blowing, and the rain falling; that the plaintiff, in obedience to the order of the conductor, stepped off the train expecting to alight upon a platform, but that, through the fault of the company, there was no platform, but an uneven piece of ground sloping from the track to a ditch, wholly unsuitable for the accommodation of passengers, down which plaintiff fell, injuring himself severely, the wheels of the car passing over his leg, wherefore plaintiff sought to recover damages. *Held* (ELLIOTT, C. J., dissentiente), that the facts averred did not clearly show that the plaintiff was free from contributory negligence, and that, therefore, in the absence of an express averment to that effect, the complaint was insufficient and demurrable.

Whether the complaint averred such facts as would support the allegation of negligence on the part of the company, defendant, not decided. FRANKLIN, COMM., being of opinion that it did; ELLIOTT, C. J., WORDEN and WOODS, JJ., contra.

Where the plaintiff files a complaint setting forth facts as above, and in addition alleges that the conductor told him when they arrived at said station and instructed him to follow and that he would light him off said train, and that he did accordingly follow said conductor, and that said conductor held his lantern and told him that the train had stopped and that he should step off, in obedience to which directions he did step off as carefully as he could, and without any fault or negligence on his part was thrown under the car and run over, *Held*, that the complaint was sufficient.

Where the plaintiff in such case files a complaint averring that none of complainant's agents lighted him off the train, but that the same had so far checked its speed that he could have safely alighted therefrom had it not as he was alighting suddenly started up at a faster rate, whereby plaintiff was without any fault or negligence on his part, thrown down and run over, *Held*, that the complaint was sufficient.

FRANKLIN, C. J.—Appellee sued appellant for injuries received while travelling as a passenger on appellant's railroad.

The complaint is in four paragraphs. A demurrer was sustained to the first, and a separate demurrer overruled to each of the second, third, and fourth paragraphs. Answer filed in three paragraphs, reply in denial to second and third, the first being a denial.

Trial by jury, verdict for appellee, motion for a new trial overruled, and judgment for appellee for $7,500.

The first three errors assigned in this court are the overruling of the separate demurrers to the second, third, and fourth paragraphs of the complaint.

The third paragraph of the complaint reads as follows:

3d. And for a third paragraph of complaint and further cause of action, plaintiff, James E. Peters, complains of the Cincinnati, Wabash and Michigan R. R. Co., and complaining says that the defendant is a corporation duly organized under the laws of the State of Indiana, and is and was at the time of the occurring of the acts hereinafter complained of. That said defendant is running and operating a railroad passing through and into the counties of Madison, Grant, Wabash, Kosciusko and Elkhart; and as such corporation engaged in carrying passengers and transporting freight.

That on the 19th day of October, 1875, this plaintiff took passage on said railroad at the city of Wabash, Indiana, in the county of Wabash, for the village of Milford, on the line of said road. That on arriving at said Milford, to which point he had paid his fare as demanded, he concluded to remain on said train until the same reached Arnold's Station, on the line of said road, in the county of Elkhart aforesaid, being nearer his point of destination, which was some distance from such railroad. That he paid to the conductor having charge of such train, and then and there being in defendant's employ in such capacity, the regular fare to said Arnold's Station; he, the said conductor, receiving the same, and undertaking, in behalf of defendant, to carry and safely deliver him at said point.

That the agents of said company having charge of said train, not mindful of their duty and the obligation of said company to so carry and deliver him, wholly neglected and refused to do so. That, on arriving at Arnold's Station aforesaid, the said train slackened its speed so that plaintiff could have with safety and without damage alighted therefrom, had there been constructed at said station a platform or other suitable place prepared for passengers to step upon when leaving the trains of said defendant.

Plaintiff avers that when said train arrived at said place it was dark, the wind was blowing, and the rain falling. That plaintiff, in pursuance of the order of said conductor, and entirely relying

on his instruction, stepped off said train as directed, expected and believing that a platform or other suitable place had been prepared by defendant for such purpose.

But that the place where plaintiff was instructed to step off and did get off said train was a rough, uneven piece of ground, sloping from such railroad track to a ditch, and wholly unsuitable for the reception of passengers.

That plaintiff slipped off such train on such ground, and by reason of the defendant having negligently failed to provide a platform, suitable place, at such station, for the reception of passengers, and of such ground being of an uneven surface, sloping and unsuitable for the reception of passengers, he fell and was thrown under such train, which passed on and over his right leg, crushing the same to such an extent as to necessitate its amputation.

That such by reason of the act and occurrence aforesaid was amputated.

That plaintiff became by reason thereof and was sick and sore for a long period of time, to wit, for the space of three months.

That he laid out and expended a large sum of money in and about the curing and healing of himself, to wit, the sum of $500. That on account thereof he was compelled to and did abandon his occupation, that of house carpenter, to his great injury and damage; that he is maimed for life, and rendered incapable of gaining a livelihood.

By reason of which acts of defendant heretofore complained of, plaintiff avers that he has been damaged in the sum of $10,000, for which amount he demands judgment, and all other proper relief. This action is based upon an injury arising from an illegal negligence of the defendant. Negligence is a mixed question of law and facts; when the facts are agreed to, it becomes a question of law. In the case of Newhouse *v.* Miller et al., 35 Ind. 463-6, the following language is used: "It is a well-settled doctrine of the law that the plaintiff cannot recover in such a case, if it appears that by ordinary care or prudence on his part he directly contributed to the injury; or, in other words, if by the exercise of ordinary care and prudence he might have avoided the injury; where the negligence is the issue it must be a case of unmixed negligence to justify a recovery, and if both parties by their negligence immediately contributed to produce the injury neither can recover. When the plaintiff is the proximate cause of the injury he cannot recover." See the authorities therein collected and cited. Negligence has been defined to "consist in the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do." Howe *v.* Young, 16 Ind. 312.

In the case at bar, according to the allegations in the complaint,

did the railroad company do anything that a reasonably prudent person would have done? The only act of negligence complained of by the plaintiff was the failure of the defendant to have had prepared a platform or other suitable place for the reception of passengers; is this, as connected with the other allegations of the paragraphs per se negligence in law? There is no description as to what kind of a station this was; as to whether it was a general public station at which trains regularly stopped for the reception and discharge of passengers, or a mere way flag station at some cross roads where trains only stopped when flagged for the accommodation of special passengers; this paragraph of the complaint is entirely silent. At a mere way or flag station where trains do not regularly stop for the reception and discharge of passengers, and only stop when they are flagged, or to discharge a special passenger, the passenger need not expect nor rely on the company's having furnished a platform or other convenient place for the reception and discharge of passengers, although that is frequently done when the road has been finished and placed in complete running order. It is very doubtful whether the paragraph sufficiently charges negligence in the defendant.

But, without deciding this question, we think there is more formidable objection to the paragraph. It in no way rebuts contributory negligence in the plaintiff. It nowhere alleges that he was without fault or negligence; nor do we think the facts stated sufficiently show that he was without fault or negligence.

The rule of pleading in such case is this: When the plaintiff charges the defendant with negligence to make a good complaint, he must also aver that he was without fault or negligence, or state such facts as will clearly show that he was without fault or negligence in the premises. If, however, there is an averment in the complaint, that the plaintiff was without fault or negligence, and the facts stated clearly show that he was not without fault or negligence, a demurrer will be sustained to the complaint. And if there is no averment in the complaint of that kind, and the facts stated do not clearly show that the plaintiff was without fault or negligence, a demurrer will also be sustained to the complaint. E. and C. R. R. Co. *v.* Dexter, 24 Ind. 411. In the case at bar there is no such averment in the complaint, and the question is, do the facts stated clearly show that the plaintiff was without fault or negligence? The plaintiff alleges that he had never been at Arnold's Station before; that when the train arrived there it was dark, the wind blowing and the rain falling; that the train slackened its speed so that he could with safety have alighted therefrom had there been a suitable platform or place to receive him; that the conductor informed him that they had now arrived at Arnold's Station, and ordered him to alight; that he, in pursuance of such order, and entirely relying on his instruction, stepped off said train as directed;

that, by reason of defendant having negligently failed to provide a suitable place for his reception, he fell and was thrown under the train.

Plaintiff was not an infant, imbecile or lunatic, but a man of mature age, a house carpenter by occupation, and nothing being shown to the contrary, he is presumed to have been in the possession, and ought to have been in the proper use of all his ordinary physical senses; he could see, feel and hear; these senses were given him to enable him to act properly, and having such capacity, he is to be held responsible for his actions.

And although the night was dark and he may not have been able to see well, and the storm may have roared so he could not hear well, there is nothing alleged showing that he was so benumbed that he had not the most acute feeling, and well knew that the train was yet in motion and had not come to a complete stop. In the case of Frenzell et al. *v.* Miller, 37 Ind. 1 P. 17, the following language is used in relation to the frauds, and we do not see but it is equally applicable in a case of this kind:

"If a party blindly trusts when he should not, and closes his eyes when ordinary diligence requires him to see, he is willingly deceived and the maxim applies, volenti non fit injuria." The same maxim would appropriately apply wherever a party stupidly yields any or all of his ordinary physical senses to the will and control of another, when ordinary prudence would have required that he should have exercised them himself. In the case of Mackey *v.* The New York Central Ry. Co., 27 Barb. 528, it was held "that the plaintiff was bound to exercise care, diligence and foresight in proportion to the danger to be avoided and the fatal consequences involved in his neglect." The same principle was approved by this court in the case of the Toledo and Wabash R. R. Co. *v.* Goddard, 25 Ind. 185, p. 199. Hence the darker the night, the more severe the storm, and the greater the ignorance of the plaintiff of that particular locality, the greater care and prudence should have been exercised by him in alighting from the train.

He does not allege that he had been informed that any platform or other suitable place had been prepared just at that point for his convenient reception, and without making any inquiry as to what would become of him, he voluntarily takes a leap into the dark, without knowing whether he would land over high trestle work into a deep gulf below, or upon a safe platform prepared for his reception. Could a man possessing his physical senses and sane in mind be said to have used due care and ordinary diligence, who had thus rashly acted? But it is alleged that the conductor said to him that they had arrived at Arnold's Station, and ordered him to alight.

Relying entirely on such direction, he stepped off without hesi-

tating, thinking or waiting for the train to stop; he immediately complied with the request of the conductor.

Instead of such wilfully blind obedience, we think this information and direction of the conductor was intended and ought to have been considered by appellee as a notice and warning to him to get ready to leave the train as soon as it should stop, and not that he should instantaneously jump off while it was yet in motion.

In the case of the Jeffersonville R. R. Co. *v.* Hendrick's Adm., 26 Ind. 228, p. 232, the court uses the following language: "On the other hand, the deceased in leaving the train was bound to exercise ordinary care and prudence to avoid injury.

"If the train had not stopped at the station so as to enable the deceased to get off, and had carried her beyond her destination, the company would have been liable in damages. But the fact that the train was passing the station without stopping, could not justify her in attempting to get off by leaping from it.

"It is the duty of those having charge of the train in such cases to stop it, to enable passengers to leave it safely, and it is carelessness in passengers to attempt to leave the train whilst it is in motion." This case was again before this court, and reported in 41 Ind. 48, and in the second opinion, the above last general expression was so modified as to declare that it was not carelessness in a passenger to leave a train when it was moving so slowly that it was safe for him to do so.

In the case of the Jeffersonville R. R. Co. *v.* Swift, 26 Ind. 459, the question in relation to the conductor directing the passenger to jump off while the train was in motion is discussed. There the train was passing the platform at the depot, the passenger was standing on the platform ready to jump off, and had been informed by another passenger that the train would not stop there. In this attitude he remarked to the conductor "that he could not make that risk;" the conductor responded that "you could if you would," or "you might if you would." In this case the court says:

"The plaintiff was a man of mature years, and we must presume of at least common understanding. He claimed to believe that the train was running at the time at a speed of at least ten miles to the hour, and under those circumstances he must have known that such a leap was at least hazardous, too much so to require the practical knowledge to teach him the fact.

The sense of sight would be sufficient to satisfy any one of the same mind of the danger in such an act, and he cannot be permitted to claim that his own misconduct and want of care did not contribute to the injury resulting from his own voluntary act, by saying that he relied on the assurance of the conductor that it was safe so to leap. . . .

"And without any other motive for the act than the fear of

being carried beyond the station where he desired to stop, a fact that did not justify him in incurring the danger.

"Under such a state of facts he was not compelled, and therefore did it voluntarily.

"It was an extremely imprudent one, and fraught with dangerous consequence, and was the direct and immediate cause of the injury. Reasonable care required that he should have remained on the car, and thereby have avoided the injury, and therefore he could not recover under such circumstances." A distinction may be drawn between that case and the one at bar; in that case the passenger had been informed that the train would not stop at the depot; in this case he had been informed that it would, and that he had every reason to believe from the slackening of its speed that it would so stop. In that case the conductor assured him there was no danger; in this case the conductor directed him to alight. But we do not think these distinctions materially change the principle.

The foregoing opinion then concludes as follows:

"A passenger is not bound to leave the train when it is in motion at the command of the conductor. He may disobey such command with impunity and may resist an effort made to enforce it; but when no threat of violent expulsion is made, and the passenger is still left in the free exercise of his will, and seeing and knowing the peril of the act, leaps from the train at the command of the conductor and is injured, can it be said that his own unnecessary and imprudent conduct has not contributed directly to the injury?"

We do not decide the question. Neither do we in this case. And as this paragraph of the complaint contains no direct averment that the plaintiff was without fault or negligence, we do not think the allegations of the paragraph sufficiently show that fact without this averment. The court erred in overruling the demurrer to this paragraph of the complaint; it should have been sustained. As to the second paragraph, it a little more specifically sets out the facts, and alleges when they arrived at Arnold's Station the conductor informed him that they were there, and for him to follow the conductor and he would light him off the train; he followed the conductor to the platform, when the conductor held his lantern and told him that the train had stopped, and for him to step off; that, in obedience to the directions of the conductor, he stepped off of the car as carefully as he could, and, without any fault or negligence on his part, he was thrown under the car and run over. The fourth paragraph alleges that when they arrived at Arnold's Station, none of defendant's agents alighted him off of the train, although it was very dark; that the train had so far checked its speed that he could safely have stepped therefrom; but before he had time to do so the train suddenly started up at a faster speed, and, without any fault or negligence on his part,

jerked and threw him under the car, and the wheels thereof ran over him. Each of these paragraphs contains the averment that the plaintiff was without fault or negligence.

And we do not think the facts alleged clearly show that he was not without fault or negligence. Therefore the question of negligence and contributory negligence ought to be left to the jury on the trial. The City of Ft. Wayne *v.* De Witt, 47 Ind. 391.

They each constituted sufficient causes of action, and there was no error in overruling the demurrers to them.

There are a number of other questions raised and discussed by counsel in the case. But as the judgment must be reversed for the error in overruling the demurrer to the third paragraph of the complaint, and these questions may not arise upon a subsequent trial of the cause, we deem it unnecessary to extend this opinion by an investigation and decision of them. The judgment below ought to be reversed.

Per curiam.—It is therefore ordered upon the foregoing opinion that the judgment below be and is hereby in all things reversed, at the cost of appellee. And that the cause be removed with instructions, to the court below to sustain the demurrer to the third paragraph of the complaint, and for further proceedings.

Dissenting opinion of Elliott, C. J.:

ELLIOTT, C. J., dissenting.—I regard the third paragraph of the complaint as good, and am therefore compelled to dissent. It is sufficient to state such facts as show that a plaintiff in an action for injuries resulting from negligence was free from fault.

The complaint does this. Where facts are stated there is no necessity in the world for the formal allegation that the plaintiff was without fault.

It is the duty of railroad companies to provide to regular passenger stations suitable and safe means for alighting from their trains. Stewart *v.* International R. R. Co., 53 Tex. 289, S. C. 37 Am. Rep. 753; McDonald *v.* Chicago and Co., 26 Iowa, 124; Calton *v.* Chicago and Co., 32 Wis. 563; Osburne *v.* Union Ferry Co., 53 Barb. 629; Imhoff *v.* Chicago and Co., 20 Wis. 364; Martin *v.* Gib. W. R. R. Co., 81 Eng. C. S. 179; Lancashire *v.* Nicholson, 3 H. S. C. 534; Caterham *v.* London, etc., Co., 87 Eng. C. L. 410; Shearman *v.* Rdf., 275; Hutchinson on Carriers, 516; Relf. Carriers, 514; Fay *v.* Lindon, etc., Co., 18 C. B., N. S., 25; Angell, Carriers, 521 n.; Wharton, Negl. §§ 652, 653. I think our own cases approve this doctrine; that of the Jeffersonville Co. *v.* Reily, 39 Ind. 568, certainly does, for it cites with unqualified commendation McDonald *v.* Chicago, etc., Co., supra; Farrell *v.* R. R. Co., 31 Ind. 408, recognizes the correctness of this doctrine.

A passenger has a right to presume that a railroad company has performed the duty imposed upon it by law. A man who reason-

ably acts upon the presumption that a railroad company whose passenger he is has done its duty cannot be deemed guilty of negligence in so acting. It would be monstrous to require a passenger to ascertain before acting whether a law-enjoined duty had been performed.

The complaint shows that it was not negligence to step from the appellant's train. It is indeed not in itself negligence to get off a slowly moving train. Kelly *v.* Hannibal, etc., Co., 70 Mo. 604; Doss *v.* M. K. and C., 59 Mo. 27 S. C., 27 Am. R. 371. But in present case the confessed allegations of the complaint show that if the appellant had done his duty by providing suitable means for alighting from its train the appellee could have alighted in perfect safety.

I borrow, as fitting glove tight this case, the language of this court in The Jeff., etc., Hendricks, 41 Ind. 48. The allegation above admitted by the demurrer to be true is that the motion of the train was so far checked that deceased could safely leave the same. If she could safely leave, so far as any risk from the motion of the train was concerned, then she ran no risk, and it was not negligence on her part to make the attempt. It would be a contradiction of terms to say that it was negligence on her part to undertake to do what she could safely do.

In the case at bar the complaint shows not only that the appellee could have got off the train in safety, but it also shows that he did get off, "under the order of the conductor, and that entirely relying on his instructions he stepped off said train as directed." Where a passenger leaves a train in obedience to the order of the conductor, and under his directions and instructions, he is not guilty of contributory negligence.

This is so, even though the act be apparently attended with some peril, but here the direct showing is that it was not at all dangerous. I believe in the wisdom, the justice and the policy of the doctrine laid down in the opinion of Fullerton, J., in McIntyre *v.* New York Central Co., 37 N. Y. 287. And I think I may safely say that all the well-considered cases approve it. Said this learned judge, in speaking of the duty of the carrier of passengers: "If in discharging that duty they required her (the plaintiff intestate) to perform an act which was perilous in itself, and in doing which she lost her life, the negligence, if any, which the act involved should be imputed to the company alone.

"The rule that contributory negligence will prevent a recovery ought not to be applied to such a case. It would seem manifestly unjust to characterize the act of yielding obedience under such circumstances, to the requirements of the party inflicting the injury, and to hold as between themselves that it should deprive the party injured of all legal redress." There are many well-considered cases sustaining this doctrine. Siner *v.* G. W., etc., Co., B. Exch.

150; McCloskey *v.* Penner R. R., 53 Ill. 513, S. C. 5 Am. R. 60; Lambeth *v.* N. C. R. R. 66 N. C. S. C. 8 Am. R. 508; Filer *v.* N. Y. R. R., 49 N. Y. 47; Georgia Co. *v.* McCurdy, 45 Ga., S. C., 12 Am. Rep. 577; Bridges *v.* The Northern R. R. Co., 60 B. 377. I confess my inability to see any distinction between this case and that of Penn *v.* R. R. Co. *v.* Hogland, this term. In that case it was said the conductor and brakeman were the agents and servants of the company, and the said Hattie E., the passenger under their charge, had a right to rely implicitly upon their statements to her and in her hearing." The rule has been extended to the case of a trespasser. Benton *v.* C. R., etc., Co., 55 Iowa, 496. It is applied to cases where a traveller undertake, to cross a railroad track by the direction of the company's servant. Bayley *v.* Eastern R. R. Co., 125 Mass. 62.

All that any complaint need do is to affirmatively show that the plaintiff acted with ordinary prudence. It was prudent for the appellee to presume that there was a proper place for alighting. It was prudent for him to attempt to alight where there was no risk, and it was also prudent for him to obey the directions of the conductor, and the complaint shows that he did act upon this presumption, and also shows that if the company had done its duty there would have been neither injury nor risk, and shows further he did obey the directions of the conductor. It does in my opinion clearly show that he acted with ordinary prudence.

The complaint not only shows the facts first enumerated, but it also shows, and in no uncertain manner, that the injury was attributable solely to the negligence of the company in requiring its passenger to alight upon an uneven piece of ground, which cast him under the wheels of the train. The cause and sole cause of the injury being shown, the hypothesis of the fault on appellee's part is completely excluded. But even more than this, it is directly averred that what he did do was done under the directions and instructions of the company, and if it was negligence to do the act it was the carrier, and not the passenger, who was negligent.

I cannot conceive a case where facts could more clearly prove due care and reasonable prudence.

WORDEN J.—While I may not concur with all that is said by Commissioner Franklin in the opinion proposed by him in this case, I am of opinion that the third paragraph of the complaint was insufficient, and, therefore, that the demurrer to it should have been sustained.

The paragraph has no general averment that the plaintiff was free from contributory negligence. Assuming that under the circumstances he was guilty of no negligence in alighting from the train at the time he did, and that he had a right to suppose a suitable platform had been provided, it still does not appear that he

alighted in a reasonably careful or prudent manner. There is no averment that he exercised any care or prudence in his manner of alighting, or guarded in the least against any injury he might receive in doing so. The circumstances that it was dark, the wind blowing and the rain falling did not relieve him from the necessity of exercising reasonable care to avoid injury in alighting. From all that appears his negligent and careless manner of alighting may have contributed to the injury, although no platform had been provided.

WOODS, J.—While I concur in the general scope of the principal opinion, I concur fully in the ground on which Worden, J., places the case.

The case above reported raises the very interesting and important question of the duty of railroad companies to their passengers, while getting on and alighting from trains. Without criticising the conclusions there reached, an attempt will be made to state briefly the principles underlying this branch of the law.

A railroad company is in the first place bound to provide a safe station and platform for the accommodation of passengers, both arriving and departing, and for such of their friends as are permitted by the regulations of the company to be upon or about the premises to speed or to welcome them. If an accident occurs in consequence of a failure to perform this duty the company is responsible. Liscomb *v.* New Jersey, etc., R. R. Co., 6 Lans. 75; McDonald *v.* Chicago & N. W. R. R. Co., 26 Iowa, 124; Seymour *v.* C., B. & Q. R. R. Co., 3 Biss. 43; Tobin *v.* Portland, Saco & Ports. R. R. Co., 59 Me. 183; Chicego & N. W. R. R. Co. *v.* Scates, 90 Ill. 586; Stewart *v.* International, etc., R. R. Co., 2 Am. & Eng. R. R. Cas. 497. So, too, in the management of its trains it is bound to use care and diligence not to injure those lawfully upon the platform. Langan *v.* St. Louis, etc., R. R. Co., 3 Am. & Eng. R. R. Cas. 368. But the right of the person injured in such cases to recover may of course be barred by his contributory negligence.

A railroad company is bound to provide its passengers safe means for stepping into a train, and if, by direction of its servants, passengers employ for this purpose any other means but the customary and usual ones, the company will be held to a strict account for their safety. Allender *v.* Chicago, etc., R. R. Co., 43 Iowa, 276.

The company is bound to stop its trains at stations for such a reasonable time as to enable passengers who desire to come aboard to do so safely, and a passenger has no right to get on a moving train. Knight *v.* Ponchartrain R. R. Co., 23 La. Ann. 462; Hubener *v.* New Orleans, etc., R. R. Co., 23 La. Ann. 492. If he does so it is at his own risk. Phillips *v.* Saratoga & Rensselaer R. R. Co., 49 N. Y. 177. If the train starts while passengers are embarking, and they are injured in consequence, the company is of course liable, unless such passengers be guilty of contributory negligence. In Detroit & Milwaukee R. R. Co. *v.* Curtis, 23 Wisc., plaintiff being directed by the railroad officials to get into one car of a train, attempted to board another. While making this attempt the train started and he was thrown to the ground. Whether or not he had been guilty of contributory negligence was held to be properly for the jury.

In Curtis et ux. *v.* Detroit & Milwaukee R. R. Co., 27 Wisc. 158, the facts were these: Plaintiff wished to get into a sleeping-car attached to a train. The train stopped, but in such a manner that the sleeping-car was not brought up to the platform. Plaintiff then attempted to get on the train at

another point, and while so doing was thrown down and injured by the sudden starting of the cars. This starting, the evidence showed, was made in order to bring the sleeping car abreast of the platform. Here also the question whether plaintiff had been guilty of contributory negligence or not was held to be for the jury.

With regard to getting off the train, the following principles may be laid down: It is not negligence on the part of the employees of the railroad company to announce the name of a station before a train has actually stopped. R. R. Co. v. Aspell, 23 Pa. St. 147. Nor is a railroad company liable in case of an accident occasioned by some person other than the servant of the company falsely announcing the arrival at a station. Col. & Ind. R. R. Co. v. Farrell, 31 Ind. 408.

It is the duty of the railroad company to stop its trains at stations at a reasonable and proper time for passengers to disembark. Southern R. R. Co. v. Kendrick, 40 Miss. 374; Penna. R. R. Co. v. Kilgore, 32 Pa. St. 293; Fairmount & Arch St. Pass. Ry. Co. v. Stutler, 54 Pa. St. 375. In order to show what is a reasonable and proper time, evidence of custom is admissible. Fuller v. Naugatuck R. R. Co., 21 Conn. 557. If, after the expiration of that time, a passenger endeavors to disembark, the train being in motion, he does so at his peril. Davies v. Chicago & N. W. R. R. Co., 18 Wisc. 175; Illinois Cent. R. R. Co. v. Slatton, 54 Ill. 133; Imhoff v. Chicago & Milw. R. R. Co., 20 Wisc. 344; Chicago & N. W. R. R. Co. v. Scates, 90 Ill. 586; and in general it seems that a passenger must not attempt to step off a moving train, although he perceives that he is being carried past his destination. If he does, he will be precluded from recovering against the railroad company in case of injury, no matter what the negligence of the company may be. Lambeth v. N. C. R. R. Co., 66 N. C. 494; Lucas v. New Bedf. & T. R. Co., 6 Gray, 64; Savett v. Manchester & L. R. Co., 16 Gray, 501; Sinnon v. N. Y. Cent. & H. R. R. R. Co., 3 Rob. 25; Ohio & M. R. Co. v. Schiebe, 44 Ill. 460; Galveston, H. & S. C. R. Co. v. Gierse, 51 Tex. 189; Nelson v. Atlantic & P. R. R. Co., 68 Mo. 593; Harvey v. Eastern R. R. Co., 116 Mass. 269; Knight v. Ponchartrain R. R. Co., 23 La. Ann. 462; R. R. Co. v. Aspell, 23 Penn. St. 147; Illinois Central R. R. Co. v. Able, 59 Ill. 131; Jeffersonville R. R. Co. v. Hendricks, 26 Md. 288; Evansville & Craw. R. R. Co., v. Duncan, 28 Ind. 441.

To this rule there are of course some exceptions. Thus, where a female passenger with three young children was disembarking from a train, and two of the children had already descended, but before the plaintiff was able to follow, the train was put in motion, it was held that she was not precluded from recovering against the company for an injury inflicted upon her while endeavoring to jump from the step after the cars had started. Penna. R. R. Co. v Kilgore, 39 Pa. St. 292; and see also Loyd v. Hannibal & St. Jo. R. R. Co., 53 Mo. 509.

It seems also that the act of a passenger in jumping from a moving train in order to avoid a collision is not such conduct as will preclude recovery against the company for injuries inflicted by the collision. S. W. R. R. Co. v. Paulk, 24 Ga. 356; Twomley v. Cent. Park R. R. Co., 69 N. Y. 158; Plopper v. N. Y., etc., R. R. Co., 20 N. Y. Superior Ct. 625.

A mere intimation by the conductor to a passenger that persons sometimes step off the train while in motion at a given point, does not justify the passenger in making the attempt, and if he does, he cannot hold the company liable for injuries received in consequence. Chicago, B. & Q. R. R. Co. v. Hazzard, 26 Ill. 373. Nor will the mere giving of advice by the conductor to a passenger, to the effect that he may safely step off, warrant him in doing so. Jeffersonville R. R. Co. v. Swift, 26 Ind. 459; for this is a mere expression of opinion on the conductor's part. Chicago & Alton R. R. Co. v. Randolph, 53 Ill. 510.

If, however, the conductor expressly directs him to get off while the train is moving, he is justified in obeying the direction, and the company will be liable if he is injured while doing so. Filer v. N. Y. Cent. R. R. Co., 49 N. Y. 47; Georgia R. R. Co. v. McCurdy, 45 Ga. 288. Unless indeed his peril be very clear, in which case it seems that the passenger is not justified in jumping, even under the direction of the conductor. Pittsburg, etc., R. R. Co. v. Krouse, 30 Ohio St. 222.

Where a passenger is either obliged to step from a high step upon a dangerous spot or elect to be carried beyond his destination, it seems that he may adopt the former alternative and, if injured, may hold the company liable. Delamatyr v. Milwaukee and P du C. R. R. Co., 24 Wisc. 578.

Where a railroad company has provided a sufficient platform for the egress of passengers from the cars, it is not liable for injuries to a passenger sustained in consequence of his voluntarily leaving them on the opposite side, and stepping on the track instead of the platform. Moreover, it is error to admit evidence of a custom of passengers getting out of the cars upon the track in preference to the platform provided for their exit. Upon this point the court says, in the case of Penn. R. R. Co. v. Fabe, 33 Pa. St. 318, as follows:

"A voluntary disregard of regulations providing for their safe exit by the platform was a disregard of their obligations to the company; and, if this were so, the plaintiffs ought not to recover. We hold on these principles that the company's liability could not be fixed for the injury consequent on a choice of the passenger, in disregard of the provisions made by them for his safety and convenience. It was, we think, error in the court to submit the question of the rights of the parties to leave the cars at either side, in the absence of proof of an existing necessity in doing so. It was not negligence on the part of the company that they did not by force or barriers prevent the parties from leaving at the wrong side. People are not to be treated like cattle; they are presumed to act reasonably in all given contingencies, and the company have no reason to expect anything else in this case."

This principle was applied in Bancroft v. Boston, etc., Ry. Co., 97 Mass. 275, under the following circumstances: Plaintiff got out of the train in a deep cut. There was a flight of stairs at some distance off by which he might have reached the surface of the ground without crossing the track. The most obvious method of effecting this, however, was by crossing the track and ascending a flight of stairs in plain sight from the spot where he alighted. Plaintiff had been at the station some time previously, and the last-mentioned staircase was then the only possible means of reaching the surface of the ground. In attempting to cross the track to reach it he was run over and injured by a passing train, but his conduct was held to be such as to preclude recovery. See Forsyth v. Bost. & Alb. R. R. Co., 103 Mass. 510, and Gonzales v. N. Y., etc., R. R. Co., 6 Robertson, 93, 297; 38 N. Y. 440; 1 Sweeny, 406, 39 How. Pr. 408; 1 Jones and Sp. 50; 50 How. Pr. 127.

But where the arrangements of the road for the accommodation of persons taking or leaving cars afford a reasonable justification to a party for being on the track, the company still owes them a duty of protection. Caswell v. Boston, etc., Ry. Co., 98 Mass. 194; Gaynor v. Old Colony R. R. Co., 100 Mass. 208; Wheelock v. Boston, etc., R. R. Co., 105 Mass. 203; Mayo v. Boston, etc., Ry. Co., 104 Mass. 137; Warren v. Fitchburg Ry, Co., 8 Allen, 227; Green v. Erie Ry. Co., 11 Hun, 333; Hoffman v. N. Y., etc., R. R. Co., 13 Hun, 589; Keller v. N. Y., etc., R. R. Co., 24 How. Pr. 172. Upon this point the court, in Gaynor v. Old Colony R. R. Co. (supra), says:

"It is claimed by the plaintiff that the arrangement, situation and use of the premises by passengers was such as to afford an invitation or allurement by implication to him and others to pass from the station across the track in the way attempted; and without doubt, if the situation and aspect of the place were such that, in connection with the actual use, the jury would be

justified in regarding them as holding it out to the plaintiff as a suitable place for him on leaving the cars to cross, and he was merely induced to attempt it, the measure of care required of him would be satisfied with far less vigilance and caution."

Where, therefore, at a station or a double track road there was no platform for passengers and nothing to indicate on which side they were to get on or off, and it appeared that they had been accustomed indifferently to get on and off on either side, it was held not to be such contributory negligence on the part of a passenger to get off on the side towards the second track as to preclude him from recovering for injuries inflicted by a passing train. Phillips *v.* Rensselaer & Saratoga R. R. Co., 57 Barb. 644. See Hulbert *v.* N. Y. Central R. R. Co., 40 N. Y. 145.

To a somewhat similar effect was Penn. R. R. Co. . White, 88 Pa. St. 327. In that case a passenger heard a brakeman call out the name of a station which was his destination. Shortly afterwards the train halted abreast of a station with that name upon it; a track, however, intervened; the passenger thinking he had arrived stepped from the car in order to reach the station, and attempted to cross the interjacent track. While so doing he was struck by a passing train and killed. It appeared that the train he left had halted in obedience to orders, and that a few minutes after it went ahead to a small platform some distance off on the opposite side of the cars from that where plaintiff was killed, at which point it usually discharged its passengers. Under these circumstances it was held that the passenger's representatives were not necessarily precluded from recovering damages for his death, and whether he was guilty of contributory negligence or not was left to the jury. See Columbus and Ind. Cent. R. R. Co. *v.* Farrell, 31 Ind. 408, and Chaffee *v.* Boston, etc., R. R. Co., 104 Mass. 108.

Where a passenger has bought a through ticket, he is bound to remain on the train, and the company will not be liable to him for injuries incurred while getting on or off at an intermediate station. State *v.* Grand Trunk R. R. Co., 58 Me. 176; and see Frost *v.* Grand Trunk R. R. Co, 10 Allen, 387.

Cf. Stuart *v.* International R. R. Co, 2 Am. and Eng. R. R. Cas. 497.

New York, Lake Erie, and Western R. R. Co.

v.

Daugherty.

(*Advance Case, Pennsylvania. March* 16, 1882.)

A railroad company is bound to use the highest degree of care and diligence for the safety of its passengers.

In suit by a passenger against a railroad company to recover damages for an injury occasioned by a misplaced switch, proof of the fact of the accident constitutes a prima facie case for the plaintiff, and throws the burden of proof on the company to show that by no human skill or forethought could the accident have been prevented.

A passenger train running at night at a high rate of speed upon a railroad track was thrown therefrom by a misplaced switch. The track-walker employed by the company had visited said switch only an hour before the accident, and found it in proper condition and safely locked. Shortly after that

inspection a train had passed thereover in safety. There was no light on the switch, that not being the custom of the company; hence the engineer of the wrecked train was unable to see that the same was misplaced until within about ten rods thereof, when he observed that the red side of the signal target was partially turned towards him. He hesitated for a moment, but before he was able to determine what he should do, the train was thrown from the track. The engine and train were not provided with the Westinghouse air-brake, but even if they had been, the engineer thought he could not have orought the train to a halt so as to avert the accident. In an action brought against the company by a passenger on the train who was injured, to recover damages, the court charged that if the defendant had done all that human prudence and forethought could do to prevent the accident, the plaintiff could not recover, but that it was for the jury to say whether it had exercised such prudence and forethought, and whether it was not its duty to guard and light the switch, and to supply a proper air-brake, and also that the jury had no right to find that the misplacing of the switch was the work of a stranger without evidence to that effect. The jury having found for the plaintiff:

***Held*, that the instructions of the court were not erroneous.**

An expert may be called to give an opinion upon a hypothetical question, if that question be framed on the facts of the case at issue.

ERROR to the Common Pleas of Susquehanna County.

Case by Jabez G. Dougherty against the New York, Lake Erie, and Western R. R. Co. to recover damages for an injury received by plaintiff while a passenger on a train on the defendant company's road.

On the trial of the case before McCollum, P. J., the following facts appeared: At about 6 o'clock on the evening of November 27, 1878, plaintiff took a train on defendant's road at Elmira, going west, and at about 8.30 o'clock, while between Canisteo and Hornellsville, and within half a mile of Hornellsville, while running at the rate of thirty-five miles per hour, the train left the track. The shock threw plaintiff forward, and by the recoil of the car he was thrown back, receiving an injury to his spine which disabled him.

The evidence showed that the cause of the accident was a misplaced switch. Defendants produced testimony to show that the road-bed was in perfect order; that the company kept two track-walkers at that point, one of whom walked the track by day, the other by night; that they had each examined the particular switch four times each day and four times each night for months preceding the accident; that the night track-walker had carefully examined it, and found it to be in perfect order one hour before the accident; that one passenger train, called the Monitor train, had passed over it in perfect safety after his examination and prior to the accident; that an average of one thousand cars per day had passed over this switch during the two years it had been there, and no accident had occurred before or since, and that the switch had not been used for two days prior to the accident, and had been securely locked at that time.

It was in evidence that the engineer had discovered the misplacement when within ten rods of the switch by noticing, by means of the head-light of the locomotive, that the target which was attached to the switch, and used as a safety signal during the daytime, was partly turned, so that, instead of showing entirely white, it showed a little red also. He testified that before he could make up his mind that there was anything wrong the train was off the track.

It was also in evidence that though the Westinghouse air-brake was being rapidly put in use on defendant company's trains at that time, the engine in question had none. It was, however, designated as the next one in order on the company's books to be sent to the shops for the purpose; and moreover the engineer testified that had the air-brake been attached, he did not know that he could have stopped the train in time to prevent the accident. There were no lights upon the switch, it not being the practice of the company to place lights outside of stations, nor was this the practice of several other first-class roads.

Dr. C. C. Halsey was called as an expert on behalf of the plaintiff, and the following question put to him, he having heard but part of the testimony of the physician who attended the plaintiff for the injury complained of.

"If a train of cars running at a high rate of speed was brought to such a sudden stop as to throw a man from his seat upon the floor, and then thrown violently backward, would that, in your judgment, account for the injury to the spine complained of in this case?"

Question objected to. Objection overruled. Answer. "I think it would." Evidence admitted. Exception.

Plaintiff requested the court to charge, inter alia, as follows:

(7) If the jury find from the evidence that the switch might have been misplaced by a passing train, or left unlocked by any of defendant's employees, they would not be warranted in finding that it was misplaced by strangers without evidence. Answer. "I instruct you that the jury are not warranted in finding any fact in the cause without evidence. All facts to be found and ascertained by a jury should be found and ascertained upon evidence. In reference to the words in the point, 'or left unlocked by any of defendant's employees,' I remark that it is claimed on the part of the defendants that under the evidence in the case the mere leaving of the switch unlocked would not account for its misplacement in the condition in which it was found on the night of the accident. You will, however, bear in mind what the evidence was upon this point."

The court charged the jury, inter alia, as follows: "It appears, so far as any evidence in the case discloses, that no examination of this switch was made after the Monitor train passed over it, after

the visit of Kelly on his first trip to Canisteo that night. There is no evidence that any examination of it was made, and no one pretends to give any account of its condition after the passage of the Monitor train over it previous to the happening of this accident.". . . "Was it practicable on the part of the defendants, in the exercise of that skill and care which the law enjoins upon them, to have maintained a watch at the point of the accident? Ought they to have provided signal lights, or ought they to have had an air-brake upon their train?"

In answer to the points presented, the court said, inter alia: "When a railroad company provides a perfectly safe road-bed for the passage of their trains, and they have no reason to believe that the rails will be wilfully misplaced by strangers, so as to throw their train from the track, they are not guilty of negligence in not having a watchman and sufficient force upon every part of the track where a secret, wilful misplacing of the rail or machinery may cause an accident. . . . If the accident was caused by a misplaced switch, and the defendants, in the exercise of that diligence and care which the law enjoins, could have prevented the misplacement, or given notice to the engineer of an approaching train of the danger caused by it in time to prevent the accident, it was their duty to have done so, and their failure to discharge this duty was negligence, and would render them liable for an injury resulting directly from it."

Verdict and judgment for plaintiff in the sum of $4416. Defendant thereupon took this writ, assigning for error, inter alia, the admission of the evidence of the witness Halsey, the answer to plaintiff's point, above cited, and the portions of the general charge above set forth.

W. H. Jessup, for plaintiff in error.

The wording of the charge would imply that the company were necessarily negligent because no one had examined the track between the passage of the Monitor train and the accident. The jury were therefore misled.

The effect of the instruction of the court was to make the company insurers. To carry out the care and precaution enjoined by such ruling, would be to require a watchman to be within call at every point on the road where a miscreant could do harm; and this would be every point throughout its whole length.

The construction of the switch, as shown in court, was such that the accident could not have been caused by accidental displacement, and this the court should have instructed the jury.

The rule as to experts is, that when they have heard all the evidence, they may be asked their opinion upon the fact testified to, leaving it to the jury to say whether the testimony is true. 3 Whart. Crim. Law, Sec. 50*d*; State *v.* Stokely, 16 Minens, 282.

Here the witness was not qualified.

Patrick and Foyle for defendant in error.

April 10, 1882. The court.—The principal exceptions in this case are taken to the rulings of the court below on the care and diligence required of carrier companies for the safety of passengers. The company defendant was held to the highest degree of diligence, and on all authority this was right. In order to excuse the company, the character of the accident must have been such that no care or forethought on the part of its agents could have prevented. (Sullivan *v.* Railroad Co., 6 Ca. 234.) The exceptions all seem to have resulted from an effort on the part of the defence to avoid this principle of the law governing passenger carriers. Prima facie the fact of the accident threw the burden of the proof on the company.

The damage occurred in consequence of a misplaced switch on the main line of its road, and it lay upon the company to show that by no human skill or forethought could the accident have been prevented. The counsel for the company seems not to have been impressed with this fact; but, on the contrary, entertained the opinion that the defendant ought to have been held only for ordinary diligence; otherwise, why have we exceptions to those rulings, which direct the attention of the jury to the possibility of the prevention of the calamity by lights on the switch, by the use of air-brakes, or by the employment of a watchman? The true and only legitimate question of the case was, whether the adoption of any one or all of these things would have prevented the injury sustained by the plaintiff.

Again, the defendants' counsel seems to have taken it for granted that, if the fact could but be established that the switch had been tampered with by some evilly disposed person, the company would be relieved from the exercise of that diligence which the law imposed upon it under ordinary circumstances. But this was a mistake; for the question still remained, Could the company have, by a watchman, or by a more careful inspection of the switch, prevented such unlawful act, or, if not, could the result complained of have been avoided by the prompt action of the engineer had the train been equipped with proper brakes? Admittedly, the switch is a weak and dangerous part of a railroad, and one reason for this is that it is necessarily more complicated and less firm than other parts of the roadway; hence the more likely to get out of order; and it would also appear, from the very theory of the defence, that it may easily be tampered with. There is, therefore, a good reason why, on a road over which many and fast trains run, the switches should be carefully watched and guarded. For the reason thus stated, we cannot see what harm was done to the defendant by the answer to the plaintiff's seventh point. It might have been affirmed unqualifiedly, and yet put no additional burden upon the company, or it might have been nega-

tived, and yet relieved the company of no responsibility. Nevertheless it is true that a jury ought not to find any fact without evidence, and the statement of this legal truism in answer to the point did not, so far as we can see, contain in itself so much as an inference that, if there really was evidence that the switch had been wilfully misplaced, the jury might not so find. On the other hand, the fifth point of the defendant, requesting the court to charge that, if the jury should find from the evidence that this accident was caused solely by the misplacement of the switch, and that the defendant had done all that human prudence and forethought could do to prevent it, the plaintiff could not recover, was affirmed.

Thus the defendant obtained all it required at the hands of the court, and even if we should admit that the jury might have been caused to hesitate by the answer to the plaintiff's point, it was, by the affirmance of this latter point, set right.

As to the question of the want of proper lights upon the switch, it does seem to us, the officers of the company themselves being the judges, that the omission in this respect was negligence. For if it was necessary to have targets to this switch, and to have them so painted that they could be seen a long distance in the daytime, much more should they, by some contrivance, be made conspicuous at night, when the dangers of the way are increased by the darkness. Therefore, what the court said to the jury on this branch of the case was quite as favorable to the defendant as it ought to have been. So also as to what was said about the air-brakes and the conduct of the engineer. If railroad companies will not properly adopt appliances obviously conducive to the safety of passengers, they have no reason to complain when charged with negligence. As to the conduct of the engineer, he himself admits that when within some ten rods of the switch, he discovered that the target was turned around about a quarter, so that it showed a little red; but instead of promptly endeavoring to stop his train, he hesitated, and the accident was the result. But this hesitancy was a mistake, and for its consequences the company are liable. An attempt is made to avoid the force of this conclusion by the allegation that his action, however prompt, would under the circumstances have been too late, for he could not see the target until it was illuminated by the headlight of the locomotive. This is probably correct; hence the imperative necessity for lights on the switch and air-brakes on the train, by which, judging from the weight of the evidence, it is well-nigh certain this accident could have been prevented.

In the exceptions to the evidence we have discovered nothing requiring correction. An expert may certainly give his opinion upon a hypothetical question if that question is framed on the facts of the case trying, and this seems to be all that is complained

of in the exception to the question put to and answered by Dr. Halsey.

The interrogatory put to the witness Alden was no doubt leading, but we cannot understand why the defendant should object to it. "There is no wear in the use of railroads on the crank of the tumbling rod?" etc. The answer to which this question leads is a negative; exactly what the plaintiff did not want, and what the defendant did want; consequently it could have done the defendant no possible harm.

From McNamara's deposition, the court ruled out all that was objectionable. As to the rest, he was clearly competent to describe what he had seen, and also to give his opinion as to the probable cause of the displacement of the switch.

The objection to the admission of the deposition of Bently is worthy of no notice, since all that was admitted of it, from the negative character of the witness's testimony, did the plaintiff no good and the defendant no harm. We conclude, therefore, that the defendant has no good reason to complain either of the rulings of the court or the verdict of the jury.

Judgment affirmed.

Opinion by Gordon, J.

The above case raises the very important questions of the obligation of railroad companies in regard to brakes and switches. It is peculiarly interesting, because in view of the testimony adduced it must be considered as laying down a very stringent rule with regard to the duty of such companies. It is nevertheless clearly in accordance with the line of decision.

The aim of this note is to review the prior cases that have occurred in this country on these points, so as to render them easy of reference.

1. BRAKES.—The duty of a railroad company in regard to the brakes employed upon its cars may be viewed in a threefold light: (1) As to the general public necessarily traversing the tracks of the company. (2) As to employees. (3) As to passengers. (1) As to the general public the law undoubtedly is that the company must exercise the highest amount of care and caution in providing and maintaining sufficient and effective brakes. As to their obligation to discard old forms of brakes and substitute new ones, the law is thus admirably summed up in Costello *v.* Syracuse, etc., R. R. Co., 65 Barb. 92.

"It is the duty of railroad companies to use upon their trains all improvements in machinery or in construction of cars commonly used by other companies, and it is negligence if they do not use them, for which they are liable to the person injured, if the improvement would, in any appreciable degree, have contributed to prevent the injury. . . . Railroad companies are undoubtedly bound to supply their trains with brakes, and if a person is injured on or crossing the track, and the injury could have been avoided by the use of the brakes, the omission to have them or to use them would be such negligence as would render them liable to the person injured.

"If they are obliged to have some brake, the public safety requires that it should be the best in use. They cannot use an old brake which will not stop a train in less than 1000 feet, when running ten miles per hour, when other companies use brakes that will stop a train in 500 feet, moving at the same rate of speed." It was therefore *held* that where a child playing upon

the track of a railroad company was run over and killed by a train of cars propelled by steam, it was error in an action brought to recover damages for the injury done to reject an offer of evidence on behalf of the plaintiff to the effect that upon other railroads more efficacious brakes were used than those employed by the company defendant, by the application of which the accident might have been averted. If the offer had been admitted, the jury might have inferred from it negligence on the part of the company defendant. A similar conclusion was reached in Oldfield v. New York and Harlem R. R. Co., 3 E. D. Smith, 103, S. C., 14 N. Y. 310, where a similar accident occurred, the cars being, however, drawn by horses. To the same effect is Owen et al. v. Hudson River R. R. Co., 7 Bosw. 329, where a stage crossing a railroad track was run into and upset by a passing train, the cars of which were provided with insufficient brakes. In that case, however, plaintiff did not recover, owing to contributory negligence on the part of the driver of the stage.

(2) As to employees, the obligation of the company is by no means so strict. The company is of course liable if an injury occurs by reason of a brake originally defective, as it is bound to furnish reasonably safe and sound machinery for the use of its servants. Columbus and Zenia R. R. Co. et al. v. Webb's Adm., 12 Ohio St. 475. But if the brake has originally been properly constructed, and has become defective either through imperfect mending in the shops of the company, or careless inspection by the company's servants, the negligence will be deemed the negligence of a co-employee, and the company will not be liable. Ibid.

If the defect in the brake be owing to the negligence of the person injured himself, he cannot of course recover. In Illinois Central R. R. v. Jewell, 46 Ill. 99, a brakeman on a railroad train, in trying to apply the brake, loosened the wheel of the car, and in consequence an accident occurred whereby he was killed. His representatives having brought suit for the injury, the evidence showed that the nut keeping the wheel in place upon the upright shaft had become unscrewed, and that this was the cause of the loosening of the wheel, and therefore of the accident. It was shown also that it was a part of the brakeman's duty to inspect that nut and keep it in place, and he having failed to do so, the plaintiffs were of course held not to be entitled to recover.

In Chicago and North Western R. R. Co. v. Taylor, 69 Ill. 461, the peculiar facts were held to warrant a recovery. The person killed was a switchman who was endeavoring to cross a flying switch in obedience to a signal. It was in evidence that the company had adopted and enforced no regulation with regard to the use of the flying switch, and a train suddenly turned upon it while the switchman was crossing, and being furnished with insufficient brakes, ran over him. The accident occurred at night, but there were no lights to enable the switchman to see the approaching train. While no one of these peculiar facts alone could perhaps be held sufficient to render the company liable, the combination of them all was judged to be sufficient, and a verdict against the company was accordingly sustained.

Where the injury has occurred through a defect in the brake occurring from some unknown cause, there can be no recovery. Wonder v. Balt. and Ohio R. R. Co., 32 Md. 411.

The obligation of a railroad company to its employees in the matter of adopting improved forms of brakes is thus laid down in the case just above cited:

"A master is not bound to change his machinery, in order to apply every new invention or supposed improvement in appliances, and he may even have in use a machine, or an appliance for its operation, shown to be less safe than others in general use, without being liable to his servants for the consequences of the use of it. If the servant thinks proper to operate such ma-

chines it is at his own risk, and all that he can require is, that he shall not be deceived as to the degree of danger incurred." The peculiar circumstances of the case were such, however, as not to raise this question very directly. The question was whether the company should have discarded the "hook" brake and adopted the "eye bolt" brake, and as regards the comparative merits of the two, the testimony of even the plaintiff's witnesses was pretty evenly balanced.

(3) As to passengers, it is believed the duties of the company are substantially the same as to the general public. In Fansh. Co. v. Reigle, 11 Gratt. 697, it was held that the omission of a stage company to have proper blocks to the brakes of their vehicles was in itself negligence, and that said company was liable for an injury to a passenger occurring in consequence.

2. SWITCHES.—The obligations of a railroad with regard to switches may also be considered (1) as to the general public, (2) as to employees and (3) as to passengers.

(1) As to the general public the use of flying switches in a populous city has been held to be the grossest negligence, (Brown v. N. Y. Central R. R. Co., 32 N. Y. 597), so that a passer-by injured by a train suddenly shunted off upon such a switch may recover against the company, even though he may have been guilty of contributory negligence, provided, of course, that it be of very small account in proportion to the negligence of the company. Illinois Central R. R. Co. v. Baches, 55 Ill. 379.

In Caswell v. Boston and Worcester R. R. Co., 98 Mass. 194, a railroad company was held liable for an injury inflicted upon a passenger standing in its depot by a train which entered the building on a wrong and unexpected track, in consequence of a misplaced switch. It was in evidence that the plaintiff was standing on another track from that on which the accident occurred, and being told she was in a place of danger, became flustered and ran directly on the track where she was injured. But this circumstance was held not to preclude her from recovery.

A horse car company must in building its tracks in the streets of a city be careful so to construct its switches as not to be dangerous to vehicles. Where therefore such a company constructed a switch higher than was necessary, and snow having fallen, salted the switch, whereby the snow thereon was melted and the switch made dangerous, the company was held liable for an injury occasioned by the upsetting of a passing sleigh. Wooley v. Grand Street R. R. Co., 3 Am. and Eng. R. R. Cas. 298.

(2) As to employees. With regard to the duty of railroad companies in regard to flying switches, see Chicago and N. W. R. R. Co. v. Taylor, 69 Ill. 461, cited supra.

The company is bound, of course, to furnish reasonably safe and efficient switches. It cannot continue to use antiquated and imperfect forms of switch an unreasonable time when new ones have in the meantime come into general use.

Where, however, the company has removed a patent switch at the plaintiff's request and substituted one in the common form he has, of course, no right to set up the defect of the appliance as negligence on the part of the company. Piper v. N. Y. Cent. and Hud. R. R. R. Co., 56 N. Y. 630.

Where an accident occurs to an employee travelling on the road by reason of a misplaced switch, the prima-facie presumption is of course that the fault is that of the switchman. Baulec v. N. Y. and Harlem R. R. Co., 5 Lans. 496, S. C., 62 Barb. 423, and this being the negligence of a co-employee, the person injured has no recourse against the company. This is so whether the plaintiff be engineer (Baulec v. N. Y. and Harlem R. R. Co., supra; Farwell v. Bost. and Worcester R. R. Corp., 4 Metc. 49) brakeman (Slattery's Administration v. Toledo and Wabash R. R. Co., 23 Ind. 81) fireman (Tinney v. Boston and Albany R. R. Co., 62 Barb. 218; Walker v. Boston and Maine R. R. Co., 1

Am. and Eng. R. R. Cas. 141) or person employed in the shops of the company who is being transported home free of charge (Gilman v. Eastern R. Corp., 10 Allen, 233, 13 Allen, 433), for all these are regarded as co-employees of the switchman. The same doctrine was applied where an injury was occasioned to a brakeman by the misplacing of a switch under charge of an under boss. Slattery's Adm. v. Toledo and Wabash R. R. Co., 23 Ind. 81, and to a person employed by the railroad company to attend to a chain placed across a street, who was run over by a train running on the wrong track, in consequence of a switchman's negligence. Sammon v. N. Y. and Harlem R. R. Co., 62 N. Y. 251.

If the railroad company, however, have not exercised due and reasonable care in selecting or retaining the switchman or under boss, and he be an incompetent person, the company will be liable. Slattery's Administration v. Toledo and Wabash R. R. Co., 23 Ind. 81; Farwell v. Bost. and Worcester R. Corp., 4 Metc. 49; Gilman v. Eastern R. Corp., 10 Allen, 233, 13 Allen, 433; Ladd v. New Bedford R. R. Co., 119 Mass. 412.

And where negligence on the part of the company in retaining a switchman is attempted to be proved by showing that his misplacing of a switch caused an accident upon a prior occasion, evidence is admissible to the effect that his conduct was investigated, and that he was pronounced free from blame. Baulec v. N. Y. and Harlem R. R. Co., 5 Lans. 436, 62 Barb. 423.

It is also always competent for the company to introduce evidence to show that the misplacing of the switch was probably done by some one else besides the switchman, and thus even if he be incompetent, they may shield themselves from liability. Ibid.

Where an employee upon an engine of the company was injured in consequence of a misplaced switch in the company's yard, the evidence not showing how the misplacing occurred, but the fact being clear that the switches were in charge of a person who was familiar with them, though not usually assigned to that duty, it was held that the person injured could not recover, as the accident must be considered either as due to the negligence of a co-employee, or as a risk which the plaintiff voluntarily assumed when he continued his work, knowing who had the care of the switches on that particular day. Tinney v. Bost. and Alb. R. R. Co., 62 Barb. 218. It seems that where the employee of one road is travelling in its cars upon the track of a second, he may maintain an action against such second road for an injury occasioned partly by the imperfection of a switch, and partly by the negligence of a switchman employed by the defendant. Smith v. N. Y. and Harlem R. R. Co., 6 Duer, 225; S. C., 19 N. Y. 227.

(3) As to passengers. The company is bound of course to provide and maintain proper and efficient switches, and to see that they are properly locked and secured. Peoria & Rock Island R. R. Co. v. Lane, 83 Ill. 449.

A railroad company does not discharge its full duty to its passengers by maintaining a switch in good order upon its road without seeing that the rails answer to the working of the switch. If it fails to do this it will be liable to a passenger injured in consequence.

In Smith v. N. Y. and Harlem R. R. Co., 6 Duer, 225, S. C., 19 N. Y. 227, the question arose as to the duty of adopting improved forms of switches. The accident had occurred through the use of the "short switch." It was contended that the "frog and guard rail" should have been adopted, the latter being an improved form of switch in very general use. The following is the language of the court upon the point:

"It has been held that railroad companies are bound to avail themselves of all new inventions and improvements known to them which will contribute materially to the safety of their passengers, whenever the utility of such improvement has been thoroughly tested and demonstrated. Undoubtedly this rule is to be applied with a reasonable regard to the ability of the com-

pany, and the nature and cost of such improvement, but within its appropriate limits it is a rule of great importance, and one which should be strictly enforced. A stronger case for the application of this rule than is here presented could scarcely arise. The improvement related to a part of the apparatus of the road, which is the source of numerous accidents. Its utility was undoubted, and its expense trifling. The defendants had themselves recognized its value. If the principle should ever be applied, therefore, it should be applied here. The defendants were clearly in fault for permitting the short switches to remain in use upon the road."

In Baltimore and Ohio R. R. Co. *v.* Worthington, 21 Md. 275, the facts were much like those of the principal case. The plaintiff who was a passenger was injured by an accident occasioned by a misplaced switch. How the misplacing occurred did not precisely appear. It was in evidence, however, that the switch was so placed that the engineer of the train could not see the indicator showing danger until within about 150 yards, when it was too late to avert the accident. The company had posted no guard at the switch. It was held that proof of the accident constituted a prima-facie case for the plaintiff, and that it was for the jury to say whether it was not negligence on the part of the company to have failed to post a guard at the switch in question, which was evidently a dangerous point.

It seems that a railroad company is liable to a passenger for an accident occurring through the negligent management of a switch, whereby the road of another company connects with theirs, even though said switch be under the care of an employee of the other company. McElroy *v.* Nashua and Lowell R. R. Corp., 4 Cush. 400.

SMITH

v.

BURLINGTON, CHICAGO, ROCK ISLAND AND N. RY. CO.

(*Advance Cass. Iowa, June* 15, 1882.)

To entitle an employee of a railroad company to recover for personal injuries through the negligence of a co-employee, it must be shown that his employment was connected with the operation of the railway.

Where nothing more is shown than that plaintiff was a section hand, and, when injured, was engaged in loading a car, this service did not pertain to the operation of the railway.

If the facts stated in the petition do not entitle plaintiff to relief, advantage may be taken of the defect by motion in arrest of judgment.

APPEAL from Fayette district court.

Action to recover for personal injury sustained by plaintiff while in the employment of defendant, resulting from the negligence of a co-employee. The court instructed the jury to return a verdict for defendant upon the evidence submitted in the case, which was done, and a judgment was rendered accordingly, from which plaintiff appeals.

Ainsworth & Hobson and L. M. Whitney, for appellant. J. & S. K. Tracy, for appellee.

BECK, J.—1. The petition alleges substantially that plaintiff was employed as a section hand by defendant to work upon its railroad, and while engaged in loading car timbers at a switch of the railroad, was, without his fault, injured through negligence of a co-employee. These facts alleged in the petition are established without contradiction by the evidence of plaintiff. There is no testimony whatever tending to show the character of plaintiff's employment and the services which he was required to perform, further than that he was a section hand, and at the time of the accident was engaged in loading car timbers. It is not shown that his employment, or the special service in which he was engaged at the time, required him to go upon the cars, ride upon them, or in any way assist in the operation of the trains upon the road. The court instructed the jury that upon the allegations of the petition, the admission of the answer, and the undisputed facts proved at the trial, the plaintiff was not entitled to recover, and directed a verdict for defendant. The questions raised by the assignment of errors all pertain to the rule of the law as recognized in this instruction. It therefore demands our attention.

2. To entitle an employee of a railroad company to recover for personal injuries inflicted through the negligence of a co-employee, it must be shown that his employment was connected with the operation of the railway. Code, § 1307; Schroeder *v.* C., R. I. & P. Ry. Co., 41 Iowa, 344; S. C., 47 Iowa, 375; Deppi *v.* C., R. I. & P. Ry. Co., 36 Iowa, 52.

We are to determine whether the record shows that plaintiff's employment was of this character. It is shown by the record, and nothing more, that plaintiff was a section hand, and when injured was engaged in loading a car. This service did not pertain to the operation of the railway. We held in Schroeder *v.* C., R. I. & P. R. Co., 41 Iowa, 344, that plaintiff, who was engaged in loading upon defendant's cars the timber of an abandoned bridge, as shown by the pleadings, was not employed in the use and operation of the railway. The facts of that case and this are alike.

In Deppi *v.* C., R. I. & P. Ry. Co., 36 Iowa, 52, and Schroeder, *v.* C., R. I. & P. Ry. Co., 47 Iowa, 375, the duty of the employee in the respective actions requires each to ride upon the cars. This fact distinguishes this case from those, and from Schroeder *v.* C., R. I. & P. Ry. Co., 41 Iowa, 344. We conclude that, upon the facts shown in the record, plaintiff was not an employee engaged in the use and operation of the railroad, and cannot, therefore, recover for the negligence of his co-employee.

3. Counsel for plaintiff insist that as the petition shows the character and nature of plaintiff's employment, which was not connected with the operation of the railroad, the defendant should have assailed the petition by demurrer, and his failure to do so waived objection to the insufficiency of the cause of action. The position

is not correct. If the facts stated in the petition do not entitle plaintiff to relief, advantage may be taken of the defect by motion in arrest of judgment. The court may, at the trial in such a case, direct the jury to find for defendant. Code, § 2650; Seaton *v.* Hinnenson, 50 Iowa, 395; Edgerley *v.* Farmers' Ins. Co., 43 Iowa, 587.

The foregoing discussion disposes of all the questions in the case. The judgment of the district court is affirmed.

LOCKWOOD, Adm'r,

v.

CHICAGO AND NORTH WESTERN RY. CO.

(*Advance Cas. Wisconsin, May* 10, 1882.)

Under section 1808, Rev. St., it is the duty of a railway train approaching a railway crossing to come to a stop, not immediately at the 400-foot post, but somewhere between that post and the crossing.

There was no error in refusing to submit to the jury the question whether the defendant railway company was negligent in running its train at the rate of eight or ten miles an hour on a certain curve, when all the evidence in the case, as well as common experience, shows that trains are daily run with safety at a much greater speed over similar curves, and where it appears conclusively that the track was in good condition.

The fact that a train was run at an unlawful rate of speed within a city, is no ground for imputing negligence to the railway company, as between it and its employee, where there is no evidence that the injury to the latter was caused by collision with any object.

If the mere fact that the car upon which the injured employee was engaged at the time of the injury was then off the track creates a presumption of negligence on the part of the company or some of its employees, it seems that such presumption is rebutted where it has been shown positively that the track was in good order, the engine car, etc., in good repair, and the train properly manned, and not run at a dangerous speed; and it is then incumbent on the plaintiff to make further proof of negligence on the part of the company.

Where a brakeman was injured by being thrown from a moving train while uncoupling the engine and tender, and it appears that he was not required to attempt such uncoupling while the train was in motion, but that the rules of the company forbade such attempt, this is such evidence of contributory negligence on his part as justified a compulsory nonsuit in an action for the injury.

APPEAL from circuit court, Dane county.

Bashford & Spilde, for appellant. F. J. Lamb, for respondent.

TAYLOR, J.—This action was brought for the purpose of recovering damages of the defendant company for causing the death of C. W. Lockwod by the negligence of said company, its agents, ser-

vants, and employees. The accident which caused the death of the plaintiff's intestate occurred before the repeal of section 1816, Rev. St. 1878, which made a railroad corporation liable for all damages sustained by any agent or servant thereof by reason of the negligence of any other agent or servant, without contributory negligence on his part. The deceased, at the time he received the injury which caused his death, was a brakeman on a freight train of said company, and had been such for some time previously. The accident which caused his death happened in the city of Madison, near the place where the defendant's track crosses the track of the Chicago, Milwaukee and St. Paul Ry. Co., in the east part of said city, at about 10 o'clock of the forenoon, on the twenty-eighth day of November, 1878. It appears, from the undisputed evidence in the case, that the train upon which the deceased was employed at the time was not a regular freight train, but was sent out from Harvard Junction to go to Baraboo, in this state; that as it came near the crossing above mentioned, the deceased, whose place was on the forward part of the train, went down the ladder at the front end of the first car, behind the engine and tender, while the train was in motion, and uncoupled the tender and engine from the train, and before he got back upon the top of the car, and before the train stopped, he fell to the ground on the east or right side of the train; that he was not run over by the wheels of the cars, but was in some way crushed and thrown three or four feet east of the rack, and when taken up it was found that his back was broken near the lower extremity thereof; that no other bones were broken and no flesh wounds of a very serious nature found. His clothes were considerably torn, and the sole of the shoe on his right foot showed marks of having been crushed by the wheel of the car. It was also established that the forward trucks of the front car, the one upon which the deceased was at the time he fell, were thrown off the track to the west; that the car ran its length or more after the trucks left the track before the train stopped, and that the body of the deceased lay nearly opposite the front end of the second car when the train stopped. At the place where the accident happened the track curved to the west.

Exactly what caused the deceased to fall from the car or in what way his back was broken, is not made clear from the evidence. The plaintiff in his original complaint alleged the injury to have happened, and the negligence of the defendant, its agents, servants, and employees, which caused the injury, in the following language:

"That at the time the train arrived at said 400-foot cost he, the deceased, in the discharge of his duties as brakeman, was required to uncouple the same from the said engine, and for that purpose and in the line of his said employment had descended the ladder in front and on the right-hand side of the first car of said train, and was in a proper position upon said car to uncouple the same from

the engine; that after said train had passed said 400-foot post a distance of about 100 feet, the said Charles W. Lockwood, deceased, proceeded, by the order and direction of the defendant, its agents, officers, and servants, to uncouple the said engine from the said train, and did properly uncouple said engine from said train as ordered and directed as aforesaid.

"That immediately thereafter, and without signal or warning, the said engine was recklessly, negligently, and carelessly moved suddenly forward, at the most rapid rate, by the defendant, its agents and servants, upon the same a short distance in advance of said train; that said cars continued to move forward with considerable speed and with great force, and were not brought to a full stop as required by law. By reason of the unlawful, reckless, and rapid rate of speed at which the same were being run within said city limits, and by reason of the same not having been brought to a full stop at said 400-foot post, or at a point 400 feet from said crossing, and by reason of said track being out of repair, and by reason of worn and defective brakes and machinery for operating the same on said cars, and by reason of the want of a sufficient number of competent and skilled brakemen to operate the same, and by reason of the negligence of other brakemen in putting on the brakes on said cars, and by reason of negligence and want of skill on the part of the defendant, its agents, servants, and employees, the conductor, engineer, and other brakemen operating said train in running and managing the same, and without any fault, neglect, or omission on the part of the said Charles W. Lockwood, deceased; that the agents, servants, and employees of the defendant upon said engine, in order to stop said train of cars before the same should reach or run upon said crossing of the Chicago, Milwaukee and St. Paul Ry., negligently, carelessly, and recklessly reversed the motion of said engine, and without blowing the whistle or ringing the bell, or giving other warning or signal, negligently and carelessly propelled the same backward with great suddenness and rapidity, and at a rate of speed greater than six miles an hour, toward and upon said train of cars, which were then moving at a greater rate than six miles per hour, within said city limits, by reason of the negligence of the defendant, aforesaid; that said engine and said train were by the defendant, its said agents, servants, and employees, the said conductor, engineer, and brakemen, and without any fault or negligence of the said Charles W. Lockwood, operated and managed so negligently, carelessly, and unskilfully, as aforesaid, that said engine collided with said train of cars with great force and violence, and that the front end of the first car next to said engine was badly smashed and broken by the collision with said engine, and was thereby thrown from the said track to the west or left-hand side thereof; that at the time of said collision said deceased was on said iron ladder provided for the use of

brakemen on the front and right-hand side of said car, next to said engine; that by reason of the negligence of the defendant, its agents, servants, and employees, the fellow-servants of the said deceased, and without any contributory negligence on his part, the said engine and said train of cars were so carelessly and unskilfully run, operated, and managed, as aforesaid, that said engine was propelled against the front end of said car, as aforesaid, before the said deceased could escape therefrom; that the said deceased was struck by said engine, or tender thereof, with such force that he was thrown between said engine and said car, and was thereby badly crushed, bruised, and mangled; that as said car was crowded upon said engine, and the front end thereof forced off the track to the left, as aforesaid, the said deceased was crushed between the said car and said engine, or the tender thereof, and pushed and thrown out on the right-hand side, and hurled to the ground with great force and violence," etc.

In the amended complaint he makes the following allegations as to defendant's negligence, and the manner in which the injuries to the deceased occurred: "That about the time the train arrived at the 400-foot post the deceased, in discharge of his duty as brakeman upon said train, was required to uncouple the same from the said engine, and for that purpose, and in the line of his said employment, was upon the first car in said train, and on or about the front end thereof; that in order to stop the said train and cars before they should run over and upon the said crossing of the Chicago, Milwaukee and St. Paul Ry. track, the said engine was negligently and recklessly reversed, and without warning or signal propelled with great force against and upon the said cars which were then running at a rate of speed greater than six miles per hour between said crossing and said 400-foot post aforesaid, and within the said city limits; that by reason thereof, and by reason of the unlawful, reckless, and rapid rate of speed at which the same were being run within said city limits, and by reason of the same not having been brought to a full stop at said post 400 feet distant from said crossing, and by reason of said track being out of repair, and by reason of worn and defective brakes and machinery for operating the same on said cars, and by reason of the want of a sufficient number of competent and skilful brakemen to operate the same, and by reason of the negligence of said other brakemen in putting on the brakes on said cars, and by reason of the negligence and want of skill on the part of the defendant, its agents, servants, and employees in operating said road and in running and managing said train, and without the fault, neglect, or omission of duty on the part of the said deceased, the front end of said car next to said engine was thrown from the track and the said deceased was precipitated to the ground with great force and violence; that by reason of bruises, wounds, and injuries then and there received through the negligent acts and omissions of the said

defendant, its agents, servants, and employees, the fellow-servants of the said deceased, and without any contributory negligence on his part, he, the said deceased, was made sick, sore, lame and disabled, and in consequence thereof he died," etc. The 400-foot post spoken of in the complaint is the post 400 feet south of the crossing, which is found at that distance from all railroad crossings in this State.

There were also general allegations in the complaint and the amended complaint that the train was run at an unlawful rate of speed within the city limits and before it came to the said 400-foot post, viz., at the rate of from 12 to 15 miles per hour. It will be seen, by an examination of the allegations in the original complaint, that the plaintiff at the time it was made was of the opinion that the deceased was thrown from the car by the sudden backing of the engine and tender after it had been uncoupled from the rest of the train, and after it had run forward from the train some little distance, and while the deceased was on the ladder returning to the top of the car after uncoupling the engine and tender. It also alleges that the tender struck the deceased and threw him between the tender and the car. In this complaint it is also alleged that the deceased was ordered to uncouple the engine from the cars, and that he uncoupled the same in pursuance of such orders. In the amended complaint it is not alleged that he was ordered to uncouple the engine and tender from the cars, but that it was in the line of his duty to do so, and for that purpose he was on the front end of the first car, and omits to allege that he did uncouple the same. It is then alleged that in order to stop the engine and cars before they ran over or upon the crossing the engine was recklessly and negligently reversed, without warning or signal, and propelled with great force against and upon the cars, and that by reason thereof the front end of the first car was thrown off the track, and the deceased was precipitated to the ground with great force and violence, etc.

The plaintiff's proofs on the trial failed to show that the reversing of the engine, and the backing of it and the tender against the cars, had any agency in throwing the deceased from the train, and that theory of the case was wholly abandoned by the learned counsel for the appellants upon the argument in this court. It is not claimed that the proof shows that the car was thrown off the track by the collision of the engine and tender with the car, nor that the deceased was struck by the tender when such collision took place. It seems to be conceded by both parties that the car was off the track before the engine and tender were reversed, and that the deceased fell from the car before the tender came into collision with it.

The learned counsel for the appellant seek now to sustain the charge of negligence against the defendant, its agents, servants, and employees, upon the theory that immediately after the deceased uncoupled the tender and engine, and before he could regain the top

of the car the forward end of the car ran off the track, and that the jolting of the car, in passing over the ties, threw the deceased from the ladder as he was attempting to return to the top of the car. Although no definite cause is shown which threw the front end of the car from the track, it is claimed that there was evidence from which the jury might have reasonably found that it was because the cars were running at too great a speed at the time, or that there was negligence in the other brakeman or other employees of the road which caused the car to leave the track, or that the track was out of repair.

It is further urged that if there was evidence which tended to show that the car was off the track before the deceased fell, and that its being off the track caused him to fall, the mere fact that the car was off the track raises a presumption of negligence on the part of the company, its agents, servants, or employees, and that the burden of proof to show the absence of such negligence was upon the defendant. It is also urged that there was evidence tending to show that the deceased was ordered by the conductor to descend and uncouple the engine and tender while the train was in motion, and that in executing such order he fell from the car without fault on his part.

On the part of the defendant it is contended that the only reliable evidence in the case shows that the deceased fell from the car before it was off the track; that his falling off threw the car from the track, and that he fell in attempting to return to the ladder, after uncoupling the engine and tender, and before he got upon the ladder; and that his uncoupling the engine and tender, while the train was in motion, was his voluntary act, done without any order from the conductor or other employees of the company, and in violation of the rules of the defendant company upon that subject. The learned circuit judge took the view of the evidence taken by the learned counsel for respondent, and nonsuited the plaintiff.

There is no serious attempt made on the part of the learned counsel for the appellant to show that the evidence introduced upon the trial proved any negligence on the part of the defendant in furnishing the train with a competent engineer, conductor, and brakemen, nor that the cars were not in good order and well made, nor in furnishing a safe and proper track upon which to run said train; but it is insisted that the evidence tends to show that the engineer and conductor were negligent in running the train at too great a speed within the city limits and when it was approaching the crossing in said city, and in not bringing the train to a stop at the 400-foot post south of the crossing; that such rapid speed caused the front end of the first car to leave the track at the curve, when it was uncoupled from the engine, and so caused the deceased to fall from the car upon the track and received the injuries which resulted in his death. Considerable importance was given to the

fact that the train was not brought to a stop when the engine reached the 400-foot post. The learned counsel for the appellant seemed to think that the defendant's servants violated the law in not coming to a full stop at that point. In this we think they are clearly mistaken. The only law upon the subject of stopping trains before crossing the track of another railroad is section 1808, Rev. St. 1878, which reads as follows: "Every train of cars, and every locomotive, about to cross the track of another railroad, shall come to a full stop before arriving at or crossing the track of such other, and within 400 feet thereof." This section does not require the train to stop when the engine reaches the 400-foot post, but between that post and the track of the railroad about to be crossed. The fact, therefore, that the train did not stop when the engine reached the 400-foot post was not a violation of any law of the State, and no negligence can be predicated upon such fact alone.

After a careful examination of the evidence in the case we can find nothing which tends to prove any actual negligence on the part of the defendant, its agents, servants, or employees in respect to the sufficiency and safety of the track of the road where the accident happened, or in respect to the capacity and skill of the parties in charge of the train at the time, or in respect to the sufficiency and safety of the cars, engine, brakes, or other appliances connected with the train.

But it is urged by the learned counsel for the appellant that there is evidence which shows that the train was run at an improper rate of speed, and that the accident may be attributed to that cause. After a careful reading of all the evidence we are satisfied that the train was not running at such a rapid rate of speed at the time the accident happened as would be likely to cause the cars to leave the track. The place at which the car left the track was on a slight curve, and it is the constant experience that trains will pass with safety over the track at such curves at a very much higher rate of speed than this train was moving at the time. All the proof there is on this subject is that the track was in good repair at that place, and that a train would pass over it with as much safety as though the track were straight.

The witness Sayers, who was a brakeman on the train, and is the only witness who testified on that subject, says: "There is no rule about slackening speed on such a curve as that. I do not think there is any more danger of a car running off on a small curve like that than on a straight track. I think a train would run about the same in respect to steadiness on a slight curve or a straight track." No jury would be justified in predicating negligence on the part of the railroad company or its employees upon the simple fact that a freight train was run at a speed of eight or even ten miles an hour on a curve such as there was in the track at the point where this accident happened, when it is the daily and hourly experience

that such trains run over such curves at a much higher rate of speed with safety. The evidence showing that the track was in good repair, there is no evidence which would justify a finding that the defendant was negligent, as between itself and its employees in charge of the train, in running its train at the rate of speed it was run, even though run at the highest rate testified to by any of the witnesses. Maher *v.* Railroad Co., 64 Mo. 267; Holman *v.* Railroad Co., 62 Mo. 562; De Graff *v.* Railroad Co., 76 N. Y. 125. It is evident the statute limiting the rate of speed at which railroad trains are to be run within a city, was a limitation made for the protection of those crossing the streets of such city, and not so much for the protection of the employees on the trains, although it might indirectly be for their protection also. Ewen *v.* Ry. Co., 38 Wis. 633, 634. The employee might allege such violation of the statute as negligence if he could trace his injury to that cause; as, for example, by showing that a collision took place with some object at some street crossing which threw the train from the track and so caused his injury. But in the case at bar there is no claim that the car was thrown from the track by any object thereon which would probably have been avoided had it been running at a less speed. That the car was off the track is not in any way connected with excessive speed, and such cannot, therefore, be assigned as a cause of the injury.

The only possible theory which would justify a verdict in favor of the plaintiff is that there was evidence tending to show that the car was in fact off the track, and that its being off the track caused the deceased to fall from the car and receive the injuries which resulted in his death.

It is argued that if there was evidence which would justify a jury in finding that the car went off the track before the deceased fell from it, and that its being so off the track caused his fall, then it was error in the circuit court to direct a nonsuit; that the plaintiff having shown the car off the track, and its being off causing the injury to the deceased, in the absence of any other testimony a presumption arises that the car went off through the negligence of the company, its agents, servants, or employees, and upon such presumption the plaintiff would be entitled to recover, unless there was clear and positive evidence that there was in fact no negligence on the part of the company or its other agents. That this is the rule applicable to railroad companies, as between them and passengers carried by them, there cannot be any serious doubt, and it is urged by the learned counsel for the appellant that the same rule is applicable to the case of an employee and the company. We are not prepared to settle this question definitely in the decision in this case, but content ourselves with the remark that it is well settled that the same degree of care is not, as a general rule, required of the company in respect to its employees as is required

in respect to its passengers, and that a presumption of negligence of the company in favor of a passenger might arise under circumstances which would not raise such presumption in favor of an employee.

But suppose a presumption of negligence does arise from the fact that the car was off the track, which presumption it was necessary to rebut by proofs, is not the presumption rebutted when the proof shows that the track was in good order, that the engine, cars, brakes, and other appliances were in good repair, that the train was properly manned, and was not run at a speed which was likely to endanger the safety of the train, or run it off the track? What other proof could be made to rebut such presumption of negligence? Remembering that, as between the company and its employees, the company is only bound to use ordinary care and not the highest degree of care, as between itself and its passengers, it would seem that the proof of such facts would rebut conclusively mere legal prima facie evidence of negligence, arising from the fact that the car was off the track, and that in order to justify a finding for the plaintiff, he would be compelled to make further proof of actual negligence on the part of the company. This seems to have been the conclusion which the court arrived at in the case of Spaulding *v.* Ry. Co., 33 Wis. 582, and 30 Wis. 110.

On the plaintiff's evidence there is no fact shown which will, under any reasonable view of the case, account for the car leaving the track; but the evidence of the defendant, and its theory of the case does show a sufficient cause. If the car was on the track when the deceased fell, his falling before the wheels of the car shows an adequate cause for its leaving the track.

An adequate cause having been shown for throwing the car from the track, and there being no other cause shown, that must be presumed to be the true cause. Kendell *v.* Boston, 118 Mass. 234, 236. This was an action to recover against the city for an injury received by the plaintiff while in the Boston Music Hall, by the falling of a statue or bust. The only evidence given by the plaintiff, after showing the ownership of the hall, that she was lawfully present at an assembly therein, was that when the audience arose the bust or statue fell, and she was injured. She was seated immediately under the bust, which was attached or placed on the outside of the balcony above. The plaintiff was nonsuited, and the nonsuit was sustained by the supreme court. In the opinion the court says: "In the present case it is not shown whether the balcony was or was not occupied by the audience; whether those comprising the audience or others did or did not rightfully have access to the place where the bust was put, and thus whether the fall may not have been occasioned by the wrongful or negligent act of some third person. It is not sufficient for the plaintiff to show that the injury may have been occasioned by the negligence

of those whom she seeks to charge with it. If there were other causes which also might have produced it, she is in some way to show that these did not operate. Without some evidence as to the manner in which the bust was attached or secured, its fall alone did not furnish sufficient evidence of negligence."

In the case at bar the evidence on the part of the plaintiff does not tend to show any adequate cause for the car being off the track, and if it was off, as is claimed, before the deceased fell, its being off is left wholly unacccounted for; and if that fact alone raises any presumption of negligence on the part of the defendant in an action of this kind, it makes out a mere prima facie case, which is overthrown, and the burden of proof shifts when its defendant shows that the track, cars, engine, brakes, and other appliances were in good condition, and the train properly manned, and not run at a dangerous speed. If the accident arises from some cause which cannot be shown, the plaintiff fails to make out a case. Steffen *v.* Ry. Co., 46 Wis. 257; De Graff *v.* Railroad Co., 76 N. Y. 125, 131. Under the evidence in this case, even if it be admitted the car was off the track when the deceased fell, the burden of proof was upon the plaintiff to show that the negligence of the defendant caused it to leave the track. He could not rest upon proof of the simple fact that it was off.

But upon the question of fact, whether the car was off the track before the deceased fell, we think the great preponderance of the evidence which is reliable and worthy of credit is against that theory of the case. The presumption that it was so off the track is not sustained by any fact proved. If it was, no cause is shown why it was. The fact, if it be a fact, is inexplicable; whereas, the fact that the car went off the track after the deceased fell is rationally accounted for. It is unnecessary to analyze or comment upon the testimony upon this question, as in either view of the case we think the whole evidence failed to show any negligence on the part of the defendant, and because we think there is another fatal objection to the plaintiff's right to recover. If the car was off the track when the deceased fell, and he fell by reason of the jolting of the car in running over the ties, then his own negligence contributed to his fall. He was clearly negligent in undertaking to uncouple the cars while they were in motion. The fact that he did so is undisputed, and his doing so placed him in a most dangerous position if the car went off the track while he was so engaged, or before he reached his place on top of the car. The evidence clearly shows that it was not his duty to uncouple the cars while they were in motion, and that his doing so was against the established rules of the company. The rules prohibited it because it is a dangerous thing to do. If he voluntarily placed himself in a dangerous position, not required of him by the rules of the company or by the order of

some superior officer or employee of the company, and he was injured while in such position, even though the negligence of the defendant was one cause of the injury, he cannot recover, because his placing himself in such dangerous position was also negligence on his part and contributed to the injury. Had he been in the discharge of his duty on top of the car and at the brake at the time, there is no presumption that he would have been injured, even though the car left the track. Fitch *v.* Allen, 98 Mass. 572; Strong *v.* Railroad Co., 60 Barb. 30; Gibson *v.* Ry. Co., 63 N. Y. 449; Whart. Neg. § 215; 2 Thomp. Neg. 1151, note 3, and cases cited; Pitzner *v.* Stinnick, 39 Wis. 129; Cremer *v.* Town of Portland, 36 Wis. 92; Prideaux *v.* Mineral Point, 43 Wis. 513; Delaney *v.* Ry. Co., 33 Wis. 67; Curry *v.* Ry. Co., 43 Wis. 665; Freeman *v.* Transp'n Co., 36 Wis. 571; Cunningham *v.* Lyness, 22 Wis. 245; Nicks *v.* Town of Marshall, 24 Wis. 139; Potter *v.* Ry. Co., 21 Wis. 372; Kearney *v.* Ry. Co., 47 Wis. 144; Otis *v.* Town of Janesville, 47 Wis. 422; Goldstein *v.* Ry. Co., 46 Wis. 404. These cases clearly show that deceased's negligence in uncoupling the cars when in motion was contributory to and a proximate cause of the accident, and must defeat the action. The claim that the deceased was ordered by the conductor to uncouple the cars before they came to a stop is wholly unsupported by the evidence. It is evident, from the pleadings on the part of the plaintiff, that the action was commenced under a mistake of the facts, and the attempt to maintain it upon the real facts as shown upon the trial cannot be sustained upon any well-settled rule of law

The judgment of the circuit court is affirmed.

FOLEY

v.

C. AND N. W. RY. CO.

(*Advance Case, Michigan. June* 21, 1882.)

In an action for negligently causing the death of plaintiff's intestate, a switch tender employed by a railway company, through the explosion of nitro-glycerine being transported by it on its road, it was *held* that the defendant, in complying with a proper request from another railroad company to run for it a short distance one of its cars, to be loaded with an article, safe when properly handled, but dangerous when carelessly handled, is not bound to assume negligence on the part of those handling it would occur, nor bound to take measures for the protection of its servants on that assumption.

When the order for switching the car was given, decedent was notified that the car must be kept out of the way of the passenger train, which would be due after a time, and that if not loaded in due season it must be sidetracked. Such order was an order of caution and not of negligence.

Where there was no evidence tending to fix upon the defendant, its officers or agents, any neglect of duty or any want of due care, judgment for defendant must be affirmed.

ERROR to Marquette circuit.

G. W. Hayden, for plaintiff in error. B. C. Cook, for defendant in error.

COOLEY, J.—Action for negligently causing the death of the plaintiff's intestate. The declaration avers that on the second day of January, 1878, the decedent was in the employ of defendant as a switchman, upon and about the switch locomotive No. 241 owned and operated by defendant; that it was his duty as such switchman at the time aforesaid, by the nature and terms of his employment, to attend and be with said switch-engine in the handling of cars of ordinary freight and to perform the ordinary duties of an ordinary switchman in the defendant's service; that it was not contemplated in his employment that nitro-glycerine was an ordinary or proper freight, such as would be loaded into the cars of defendant to be handled by said switch-engine while he was employed thereon, but that the handling of the same was extra-hazardous employment as to him, and beyond and out of the line of his employment as such switchman; that on the day aforesaid there was a large lot of nitro-glycerine stored at a point on the line of defendant's road between Ishpeming and Negaunee, and decedent was ordered by defendant to go with said switch-engine and take a car to the place where the same was stored, to be loaded with the same, and to haul the same away when loaded; that such order was wrongful on the part of defendant and contrary to the employment of decedent; that nitro-glycerine is exceedingly explosive and dangerous; that the decedent had no experience with or knowledge of its dangerous qualities, and defendant wholly neglected and failed to inform him of its dangerous nature and qualities, or to warn or caution him as to any measures for his safety; that decedent obeyed said order, and proceeded with said switch-engine to the place where said nitro-glycerine was stored, and while there and in the exercise of proper care was killed by its explosion. The negligence here charged against the defendant is seen to consist in sending him into the vicinity of a dangerous explosive without informing him of the danger and giving proper caution.

A second count sets out facts to show that the nitro-glycerine was improperly put up in ordinary tin cans wholly unprotected, and for that reason was specially liable to explosion in handling, and exposed those coming near it to more than the ordinary dangers. The allegation of negligence is substantially the same in the two counts.

The facts brought out on the trial were the following: Foley, at

the time of the accident, was 21 years of age, and had been in the employ of defendant for two years. He had lived in the neighborhood for many years. It was a mining district, and nitro-glycerine was constantly made use of for mining purposes, the Lake Shore Nitro-Glycerine Company supplying 60,000 to 70,000 pounds a year. On January 1, 1878, that company contracted with the Marquette, Houghton and Ontonagon R. R. Co. to transport 4800 pounds of nitro-glycerine from Negaunee to Champion, a point on the last-named road, and for convenience it was brought to a point on defendant's road less than a mile from Negaunee, where the Marquette, Houghton and Ontonagon R. R. Co. proposed to receive it. For this purpose an agent applied to defendant to switch the empty car of the Marquette, Houghton and Ontonagon road to the point where the nitro-glycerine was stored, and then to switch the loaded car back to Negaunee. It was upon this service that the decedent was sent. The defendant had nothing to do with the transportation of the nitro-glycerine except to switch the car as above for the Marquette, Houghton and Ontonagon R. R. Co., and it had nothing whatever to do with the loading of the car, which was done by the servants of the Lake Shore Nitro-Glycerine Company. The evidence tended to show that no accident from the handling of nitro-glycerine had ever before occurred among the mines in that part of the State; that it was not dangerous when properly put up and properly handled; that the fact of its being used for blasting in the mines was generally understood in the community; that decedent had at one time had its qualities explained to him by a person engaged in its manufacture, and that when he was directed to switch the car he understood for what purpose it was being sent to the place of loading. The accident occurred while the nitro-glycerine was being loaded.

The circuit judge instructed the jury that the facts put in evidence had no tendency to show negligence in the defendant; and they accordingly returned a verdict in defendant's favor.

If the nitro-glycerine was improperly put up in packages as the plaintiff claims, and for that reason its handling was extra hazardous, there was no evidence that knowledge of the fact was brought home to defendant. The officers and agents of defendant had a right to assume that the nitro-glycerine company was in the exercise of due care, and that its merchandise was in proper and safe packages. If it had been, the evidence is conclusive that danger could only have come from improper handling.

The question then seems to be this: Whether defendant, in complying with a proper request from another railroad company to run for it a short distance one of its cars, to be loaded with an article which was safe when properly handled, but exceedingly dangerous when carelessly handled, was bound to assume that negligence on the part of those handling it would occur, and bound to take meas-

ures for the protection of its servants on that assumption. And if this question shall be answered in the affirmative, the further question will be presented: What measures of protection could the defendant take short of absolute refusal to remove the car at all? The switchman knew what was to be loaded and had a general knowledge of its qualities; but more particular and specific information to him on that subject would have been entirely without value. He was not to handle the nitro-glycerine, and he could exercise no control over the action of those who were. Caution from him on the subject would not be likely to receive attention from the men whose business it was, and who handled it constantly. The only caution to decedent which could have been of the least service would be the caution to keep away altogether. If he was entitled to this, it necessarily follows that defendant should have refused altogether to move the car over its track. But it was not claimed on the argument that this could have been properly and even lawfully done. Public Acts 1873, p. 506, § 10.

It was proved on the part of the plaintiff that when the order for switching the car was given, decedent was notified that the car must be kept out of the way of the passenger train which would be due after a time, and that if it was not loaded in due season it must be side-tracked. This, it is said, may have tended to cause haste and consequent carelessness in the loading. There is not the slightest evidence that it did so, and the time before the passenger train would be due was shown to be ample. The order was probably needless, but it was an order of caution, not of negligence, and the officer who gave it is to be commended, not blamed. Further discussion of this case is needless. There was not the slightest evidence tending to fix upon the defendant, its officers or agents, any neglect of duty or any want of due care. The judgment must be affirmed with costs.

The other justices concurred.

JOHN E. PLUMMER

v.

EASTERN R. R. CO.

JOHN E. PLUMMER AND WIFE

v.

SAME.

(73 *Maine Reports*, 591. *June* 12, 1882.)

A traveller in crossing a railroad is bound to exercise such care as a prudent man, in approaching such a place, would ordinarily use for the protection of life.

The fact that one in attempting to cross a railroad does not, at the instant of stopping on it, look to ascertain if a train is approaching, is not conclusive evidence of a due want of care on his part.

His omission to do so is to be submitted to a jury for their consideration.

ON motion to set aside the verdict of the jury.

These two actions were tried together and the jury returned a verdict in the first for five thousand and one hundred dollars, and in the second for twelve hundred dollars.

The case and material facts are stated in the opinion.

Strout and Holmes, for the plaintiffs.

Webb and Haskell, for the defendant.

Both the plaintiffs declare that, acting upon the presumption that there could be no train coming from the westward, they approached and passed upon the crossing without looking that way, and only looked up, when they were almost under the approaching train.

They both admit that they only turned their attention to the track towards Portland, and did not take any precaution as to trains in the other direction.

This was gross and inexcusable negligence, and contributed to the accident. It was such contributory negligence as effectually defeats their actions.

The plaintiffs have not any pretence or pretext for excuse of their reckless and rash proceeding, in any ignorance of the existence or situation of the crossing. They were perfectly familiar with it, and with all its features of blindness, concealment or obscuration.

Now, as matter of law, such conduct on their part was contributory negligence. And in cases when the facts are undisputed, neg-

ligence is a matter of law for the court. Penn. Ry. Co. *v.* Righter, 13 Vroom, 180; In Law Reg., vol. 20, p. 142; Grows *v.* M. C. R. R., 67 Maine, 104; Clark *v.* Boston and Albany R. R., 128 Mass. 1; In Chicago and Alton R. R. *v.* Amelia T. Robinson, decided in 1881, reported only in papers, it was held to be "the duty of a person approaching a railroad crossing to carefully look out for trains, although the signals required by law are not given, and it is gross negligence to omit this precaution." Wildes *v.* Hudson R. R., 29 N. Y. 315; Ernst *v.* Hudson R. R., 39 N. Y. 61; Wilcox *v.* Rome and O. R. R., 39 N. Y. 358; R. R. Co. *v.* Huston, 95 U. S. 697; Butterfield *v.* Western R. R., 10 Allen, 532; Allyn *v.* Boston and Albany R. R., 105 Mass. 77.

APPLETON, C. J.—This is an action on the case against the defendant corporation for negligence, by reason of which the plaintiff while attempting to cross their track with his wife received a severe injury, for which compensation is sought.

There are no exceptions to the rulings of the presiding justice. It may, therefore, be assumed that they were in strict accordance with the legal rights of the parties.

The case comes before us on a motion for a new trial, on the ground that the verdict was against the law.

The plaintiff claims that no bell was rung nor whistle blown, as should have been done to give notice of the approaching cars. The evidence on this point is contradictory, but the jury must have found against the defendant on both these questions. The matter was properly left to the jury, and no sufficient reasons are shown for interfering with their conclusions as to these points.

But the defendants, not contesting the findings of the jury on these points, insist that there was contributory negligence in not stopping and looking in both directions for coming trains.

Whether contributory negligence existed or not is a mixed question of law and fact; the fact is to be determined by the jury on competent evidence and in accordance with the principles of law as given by the court for their guidance. "It is negligence," say the court in Grows *v.* Maine Central, 67 Maine, 104, "to attempt crossing the track of a railroad without looking to see if the cars are approaching. If the traveller does not look and his omission contributes to his injury, he is guilty of such negligence as will bar his recovery, notwithstanding the negligence of those in charge in omitting to sound the whistle or ring the bell."

This case came before the court on demurrer to a declaration in which it was alleged that the plaintiff saw the cars were approaching and about forty rods from the crossing.

It is in evidence that the plaintiff did not stop immediately before crossing the railroad track. It was held in Penn. R. R. Co. *v.* Beale, 73 Penn. 504, that the failure of a traveller to stop, immedi-

ately before crossing a railroad track, was negligence per se. It was held otherwise in New York, where it was decided that it was not, as matter of law, negligence for a person approaching a railroad train in a carriage upon a highway, not to stop; his omission to do so is a fact to be submitted to a jury. Kellogg *v.* R. R. Co., 79 N. Y. 72. The fact that a person who, in attempting to cross a railroad, does not at the instant of stepping on it, look to ascertain if a train is approaching, is not conclusive of a due want of care on his part. Chaffee *v.* B. and L. R. R. Co., 104 Mass. 108; Williams *v.* Grealy, 112 Mass. 79.

The bell not having been rung nor the whistle blown, the negligence of the defendant is established. Was the plaintiff under the circumstances in the exercise of ordinary and common care? The morning train had already passed. The train from the west was not due. The customary signals of approaching cars had not been given. It was the bounden duty of the defendant to give those signals of danger, and the plaintiff had a right to expect them, and not hearing them, to assume that there was no car sufficiently near to endanger the passage over the track. Tabor *v.* Missouri R. R. Co., 46 Mo. 353. It is true the plaintiff did not stop and listen, but he states that as they drove "most down to the station," his wife asked if there were any cars coming, to which he replied no, not from Boston, "unless there was extra trains, and he (I) was looking for the train." To the inquiry which way? his reply was "from Portland, and I looked towards Boston and I did not see any train coming from any direction." The wife testifies that she asked her husband if there were any cars coming, to which he answered in the negative, giving as a reason that the train had not time to get out so that another could come from Oakhill; that she looked Portland way and then the other way and the train was close upon them—that she had looked away from Portland before this, through the opening to see if she could see any. The plaintiff and his wife looking in both directions, hearing no sound of cars, whistle or bell, and with vision somewhat obstructed by buildings and trees, attempted to cross, and in that attempt were injured. The jury found they were in the exercise of ordinary and common care. Is that verdict so manifestly erroneous that it should be set aside? It is true the plaintiff was bound to exercise his sight to avoid danger, but he was not bound to use the greatest possible diligence. He was bound to exercise such care as a prudent man approaching such a place would ordinarily use for the protection of life. It is uncertain to what extent he could see the cars through the intervening obstructions. His attention was called to the danger, and he and his wife looked to see if there was a train in view. The obstructions may have prevented their seeing. Seeing nothing, hearing no warning of danger through the negligence of the defendants, in attempting to cross the plaintiff was injured. Under the circumstances of the

case, it was for the jury to determine whether he exercised the care the law requires. The jury saw and heard the witnesses; they examined the premises and with the best means of judging have arrived at a conclusion, which is not so manifestly erroneous as to demand our interference. Kellogg *v.* N. Y. C. and Hudson R. R. Co., 79 N. Y. 72; The Cleveland C. and C. R. R. Co. *v.* Crawford 24 Ohio St. 631; Stackus *v.* New York, C. and H. R. R. Co., 79 N. Y. 465.

Motion overruled.

WALTON, BARROWS, DANFORTH and PETERS, JJ., concurred.

VIRGIN and SYMONDS, JJ., non-concurred.

See note, p. 128.

THE PEOPLE'S PASSENGER RY. CO. OF BALTIMORE CITY

v.

RICHARD B. GREEN.

(56 *Maryland Reports*, 84. *March* 18, 1881.)

In an action against a street passenger railway company the evidence showed, that the plaintiff while riding in a car of the defendant, got up and gave his seat to an elderly lady. The car being crowded he was obliged to pass out on to the front platform. While standing there the car ran off the track, and at the request of the driver the plaintiff, with others on the platform, got off and assisted in getting the car again on the track. When this was done the passengers got on the front platform again by stepping over an enclosure three feet high surrounding the same; and while the plaintiff was in the act of getting on the platform in the same manner, the driver, without a signal or warning, started the horses. By the sudden jerk in starting, the plaintiff was thrown down on the side of the car and was dragged some distance, and his foot crushed by the wheel. The accident occurred in the day time, and there was proof tending to show that the driver might have seen the plaintiff in the act of boarding the car. Proof was also offered to show there was a notice on the inside of the car requiring passengers to enter and leave the car by the rear platform. *Held:*

1st. That, conceding there was negligence on the part of the plaintiff in attempting to enter the car by the front platform, the question was whether the driver of the defendant's car, by the exercise of proper care and prudence, might have seen the position of the plaintiff, and thereby have avoided the injury.

2d. That under the circumstances of the case, taking into consideration that the plaintiff had paid his fare, and that owing to the crowded condition of the car he was obliged to stand on the front platform, that he had gotten off at the request of the driver to help in getting the car again on the track, and the other facts in the case, there was an obligation on the part of the driver to see that the plaintiff and others had an opportunity to get on the car again before he started the horses; and if he saw, or by the exercise of proper care might have seen, the position of the plaintiff, and thereby have avoided the injury, the defendant was liable.

3d. That there was evidence legally sufficient to submit this question to the jury.

The defendant offered in evidence a photograph of another street railway car, and proposed to prove that it was an exact representation of the car upon which the accident happened. On objection, it was *held:*

That it might have been competent to have offered in evidence a photograph of the car upon which the accident happened, but not the photograph of another car, and then supplement the proof by showing that the two cars were alike.

APPEAL from the Baltimore City Court.

The case is stated in the opinion of the Court.

First Exception.—The defendant offered as a witness William H. Patterson, who testified that he was the Secretary of the People's Passenger Ry. Co., and had general charge of its business. Counsel for the defendant then handed the witness a photograph of a street railway car, and proposed to prove by him that this photograph was an exact representation of the car upon which the accident to the plaintiff occurred, although not one taken of that particular car, but of one identically like it, for the purpose of submitting said photograph to the jury for their inspection. The plaintiff objected to the admissibility of said photograph, and of any evidence in regard thereto; and this objection being sustained by the court (GAREY, J.,) the defendant excepted.

Second Exception.—The plaintiff offered the three following prayers:

1. That if the jury find that the plaintiff was a passenger on defendant's road, and had paid his fare at the time of the accident referred to, and shall further find that it occurred in the manner testified to by the plaintiff and the witness Schulkherdt, then the plaintiff is entitled to recover.

2. That if the jury find that the plaintiff was a passenger on the defendant's road, and had paid his fare at the time of receiving the injuries testified to, then the plaintiff is entitled to recover, although the jury may find that the plaintiff did not use the care of a reasonable and prudent man in attempting to get on the car by the front platform, provided they further find that the driver, by using the ordinary prudence and care of drivers of such cars, might have seen the position of the plaintiff, and might have avoided the accident.

3. Should the jury find for the plaintiff, then they should consider the character of the injuries received, how far they disabled the plaintiff from pursuing his ordinary occupation, and also the physical and mental suffering to which he was subjected by reason of such injuries, and allow such damages as in their judgment would be a fair and just compensation for the same.

And the defendant offered the eight following prayers:

1. That if the jury believe from the evidence that the injury to

the plaintiff was attributable to the combined negligence of the plaintiff and defendant, if the jury shall find such negligence, then the plaintiff is not entitled to recover.

2. That if the jury believe from the evidence in this cause, that if the plaintiff himself had exercised reasonable care and caution in entering the car of the defendant, that the accident which befel him would not have occurred, then the plaintiff cannot recover in this action.

3. That if the jury believe from the evidence in this cause that the plaintiff attempted to enter the car of the defendant by climbing over the enclosure of the front platform of said car, if they find that said platform was enclosed, and if they further find from the evidence that said act of the plaintiff contributed directly to the accident of the plaintiff, then the plaintiff is not entitled to recover, even although the jury may further find that there was negligence on the part of the defendant.

4. That if the jury believe from the evidence that the front platform of the car on which the plaintiff was injured was enclosed for the purpose of preventing passengers entering or leaving the car by said front platform, and if they further find that the plaintiff was injured while attempting to enter the car by climbing over this enclosure, then said act on his part was such contributory negligence as disentitles him to recover in this action.

5. That the regulation of the People's Passenger Ry. Co., prohibiting passengers from getting on or off at the front end of the car, and requiring them to enter and descend by its rear platform, is a reasonable regulation; provided they find the existence of said regulation at the time of the accident to the plaintiff, and the fact of said front platform being enclosed as testified to by the witness, Richard B. Green, if the jury shall believe such enclosure existed, sufficiently advised and gave notice to the plaintiff of the existence of said regulation, and if the plaintiff was injured in the act of violating said regulation, this is conclusive evidence of contributory negligence on his part, and disentitles him to recover in this action.

6. That if the jury find from the evidence that there was a regulation of the defendant requiring all passengers on said road to enter and leave by the rear platform, that said regulation was a reasonable one; and if they further find that the plaintiff knowingly violated the same at the time he was injured, then the plaintiff cannot recover in this action, and the jury are at liberty to infer the knowledge of said regulation on the part of the plaintiff, from the fact that all the cars of the defendant contained a printed notice of said regulation, and from the further fact that the said front platform was enclosed, provided they find said regulation was posted in said cars, and said platform was enclosed.

7. That unless the jury find that the defendant, or its agent,

was guilty of wanton and malicious or gross and outrageous conduct in the matter of the accident which befel him, the plaintiff is entitled to recover in this action simply the actual damages suffered by him, and not exemplary or punitive damages, and that there is no evidence in this cause of any wanton and malicious or gross and outrageous conduct on the part of the defendant, or its agent, to plaintiff.

8. That if the jury find from the evidence that there was a regulation of the defendant, requiring all passengers on said road to enter and leave by the rear platform, then said regulation was a reasonable one; and if they further find that the plaintiff knowingly violated the same at the time he was injured, then the plaintiff cannot recover in this action, and the jury are at liberty to infer the knowledge of said regulation on the part of the plaintiff, from the fact that all the cars of the defendant contained a printed notice of said regulation; provided they find said regulation was posted in said car.

The Court refused the plaintiff's first prayer and granted his second and third, and granted the defendant's third and seventh prayers, and refused its first, second, fourth, fifth, sixth, and eighth prayers; and gave the following instruction of its own in lieu of the defendant's first and sixth prayers:

The jury is instructed, that if they find from the evidence that by one of the regulations of the defendant, intended for the safety of passengers, persons using their cars were prohibited from getting on or off at the front end of any car, but were required to enter and leave by the rear platform only, and that notice of such regulation was put up inside of the car, in which the plaintiff was a passenger, in such a manner as to be legible to all passengers, and that the plaintiff had notice of said regulation; then if they further find that the plaintiff was injured in an attempt on his part to enter said car by the front end, their verdict must be for the defendant; and if they find that plaintiff had ridden on the inside of said car, they may infer from that fact that he had notice of the said regulation.

The defendant excepted, and the verdict and judgment being rendered against it, appealed.

The cause was argued before Bartol, C. J., Bowie, Miller, Robinson and Irving, J.

Thomas J. McKaig, Jr., for the appellant.

Albert Ritchie for the appellee.

Robinson, J., delivered the opinion of the Court.

This is an action by the appellee to recover damages alleged to have been caused by the negligence of the appellant.

On the day in question the appellee was a passenger in the street car of the appellant, and after riding some distance he got up and

gave his seat to an elderly woman. The car inside and the rear platform being crowded he was obliged to pass out on to the front platform.

In turning the corner of Henrietta and Charles Streets, the car was run off the track, and at the request of the driver the appellee and others standing with him on the platform got off, and assisted in getting the car again on the track. When this was done, the passengers got on the front platform again by stepping over a guard or enclosure three feet high surrounding the same, and while the appellee was in the act of getting on the platform in the same manner, the driver without a signal or warning of any kind started the horses. The sudden jerk in starting threw the appellee down on the side of the car. Holding on to the iron railing of the car he was dragged some distance, when the wheel ran over his foot crushing it badly. The accident occurred in the day time, and there was proof tending to show that the driver might have seen the appellee in the act of boarding the car.

Proof was also offered by the appellant, to show there was a notice on the inside of the car requiring passengers to enter and leave the car by the rear platform. Upon these facts the Court instructed the jury:

1st. That although the plaintiff may not have used the care of a reasonable and prudent person in attempting to get on the car by the front platform, yet if the driver, by using the ordinary prudence and care of drivers of such cars, might have seen the position of the plaintiff and might have avoided the injury, the plaintiff was entitled to recover.

2d. If the plaintiff attempted to enter the car by climbing over the front enclosure of the platform, and such act on his part contributed directly to the accident, then he is not entitled to recover, although the jury may find there was negligence on the part of the defendant.

3d. If by one of the regulations of the defendant, intended for the safety of passengers, persons were prohibited from getting on or off at the front end of any car, and were required to enter and leave by the rear platform only, and that notice of such regulation was put up inside of the car in which the plaintiff was a passenger, and that he had notice of such regulation, and the plaintiff was injured in an attempt to enter the car by the front platform, the verdict must be for the defendant, and if the jury should further find that the plaintiff had ridden on the inside of said car, they may infer from that fact that he had notice of said regulation.

The appellant, however, insists, that the attempt on the part of the appellee to enter the car by the front platform was such a glaring act of negligence as to disentitle him to recover, and this too irrespective altogether of the question of care and prudence on

the part of the appellant by which it might have avoided the consequences of the appellee's negligence.

Cases may and do sometimes occur, in which the question of contributory negligence is one of law, to be decided by the Court upon the facts proved, or facts to be found by the jury. As for instance where the uncontradicted proof shows that the injury was occasioned by the concurrent negligence of both parties, or where it was caused entirely by the negligence of the plaintiff, or where the proof is so slight and inconclusive as not to justify a jury reasonably to find negligence on the part of the defendant. In this case, however, the Court was right, we think, in submitting the question of negligence to the jury. In the multitude of cases in which contributory negligence has been considered, there is, we must admit, some confusion and inconsistency in the terms and expressions used by Judges in the attempt to formulate rules defining the nature and character of negligence, by which the respective rights and liabilities of parties are to be determined.

In Lewis' Case, 38 Md. 588, we recognized and adopted the rule laid down by the Exchequer Chamber in Tuff *v.* Warman, 94 E. C. L. Rep. 583, as furnishing the best and most satisfactory guide in cases of this kind. The question affecting the plaintiff's right to recover had been dealt with by the English Courts in several well considered cases, beginning with Butterfield and Forrester, 11 East, 60, and ending with Tuff and Warman.

In Butterfield and Forrester, it was held that the plaintiff was not entitled, if the mischief was caused by his own want of ordinary car. This rule, however, was qualified in several subsequent cases, and in Dowell *v.* The General Steam Navigation Company, 85 Eng. C. L. Rep. 195, it was said that the negligence to constitute a bar to the action must be the proximate cause, "the causa causans."

At the trial of Tuff *v.* Warman, in the Court of Common Pleas, Mr. Justice Williams used the expression "direct cause." It must be obvious to every one that the terms "proximate" and "remote," and "direct," involving necessarily the somewhat metaphysical doctrine of causation, are more or less open to criticism when applied to a subject-matter to be determined by a jury of practical men. And accordingly, when the case of Tuff *v.* Warman came up before the Exchequer Chamber, the Court said:

"It appears to us, the proper question for the jury in this case, and indeed in all others of the like kind, is whether the damage was occasioned entirely by the negligence or improper conduct of the defendant, or whether the plaintiff himself so far contributed to the misfortune by his own negligence or want of ordinary and common care and caution, that, but for such negligence, or want of ordinary care and caution on his part, the misfortune would not have happened. In the first case, the plaintiff would be entitled to

recover, in the latter he would not; as but for his own fault the misfortune would not have happened. Mere negligence, or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such, that, but for such negligence or want of ordinary care and caution, the misfortune could not have happened; nor, if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff."

This case was most elaborately argued, and fully considered by the Court, and the rule thus laid down furnishes, we think, the most satisfactory rule for the guidance of juries in cases of this kind.

If it be conceded, then, that there was negligence on the part of the appellee, in attempting to enter the car by the front platform, the question is whether the driver of the appellant's car, by the exercise of proper care and prudence, might have seen the position of the appellee, and thereby have avoided the injury. And in answer to this, it may be said there was no obligation upon the driver to look after, or to exercise any care and prudence in regard to persons attempting to board the car by the front platform, because such persons had no right to enter the car in that direction. Ordinarily, this would be true, but under the circumstances of this case, taking into consideration that the appellee had paid his fare, and that, owing to the crowded condition of the car, he was obliged to stand on the front platform, that he had gotten off at the request of the driver, to help in getting the car again on the track; in view of these and other facts in this case, there was an obligation on the part of the driver, to see that the appellee and others had an opportunity to get on the car again before he started the horses, and if he saw, or, by the exercise of proper care, might have seen the position of the appellee, and thereby have avoided the injury, we think the company was liable. The accident occurred in the daytime, and the appellee was but a few feet from the driver. There was evidence, we think, legally sufficient to submit this question to the jury. It is unnecessary to examine in detail the several prayers refused by the Court. The instructions granted certainly presented the law as favorably for the appellant as it had any right to expect.

Nor do we find any error in excluding the evidence offered in the first exception.

The appellant offered a photograph of another street railway car, and proposed to prove by a witness that it was an exact representation of the car upon which the accident happened. We may recognize, it is true, that photography is governed by general laws, which are uniform in their operation, and that we may expect to find a correct likeness of objects subjected to such laws, and it might therefore have been competent to have offered in evidence

a photograph of a car upon which the accident happened; but not the photograph of another car, and then supplement the proof by showing that the two cars were alike.

Finding no error in the rulings below, the judgment will be affirmed.

Judgment affirmed.

BARTOL, C. J., dissented.

See Note Germantown, etc., Ry. Co. v. Walling, 2 Am. and Eng. R. R. Cas. 26.

COOK, Respondent,

v.

CLAY STREET HILL R. R. Co., Appellants.

(*Advance Case, California. June* 28, 1882.)

Case stated where the verdict against defendants for negligently causing the death of plaintiff's intestate was sustained by the evidence.

First—The plaintiff was allowed to testify that it was the usual custom of deceased during his married life to be at home after business hours, and that they had lived a happy married life. That for eight years prior to his death she had been an invalid and unable to leave the house, and that during that time he had been very kind and attentive, and that she was dependent upon him. Second—The daughter of deceased was allowed to testify that he was kind as a father; that the social and domestic relations as to the family, on his part, were happy, and that he was kind and loving to plaintiff. Third—The plaintiff was permitted to testify that after deceased had been taken to his home she discovered pieces of flesh. *Held*, the first and second points above stated are fully covered by Section 877, Code of Civil Procedure: "Such damages may be given as under all the circumstances of the case may be just," and by the decision in Beeson v. Green Mountain Gold and Silver Mining Co., 57 Cal. 20. Plaintiff sued as heir-at-law and as administratrix; in both respects the testimony of plaintiff's relations with deceased was admissible; in the latter respect testimony as to the relations of the father and daughter was admissible.

There is nothing in the case to show that any damages were asked or given for suffering borne by the deceased; the action was for negligently causing his death, and the evidence given was of circumstances attendant upon the injury.

The testimony showed that deceased was 59 years old, the surviving family consisting of his widow and daughter, 23 years of age; that he was a game and poultry dealer, and made a good, comfortable living for himself and family. The verdict was for $8000. The plaintiff was an invalid, having been for years dependent upon her husband. *Held*, the amount given by the jury could not be said to be more than, "under all the circumstances of the case," is just. (C. C. P., 877.)

APPEAL from Superior Court, San Francisco.

Estee & Boalt, for appellant.

Newhall & Deuprey, for respondent.

MYRICK, J., delivered the opinion of the court:

The defendant is the owner of a street railroad in San Francisco, running on Clay Street, between Kearny Street and Van Ness Avenue. The cars are propelled by means of an endless cable, and to each car is attached a dummy, carrying the gripping apparatus. Seats are arranged on the sides and at the end of the dummy for the use of passengers. The railroad has two tracks, the northern track being for cars going up hill from Kearny Street, and the southern track being for descending cars. On the 14th of June, 1880, John H. Cook, plaintiff's husband, seated himself as a passenger at the lower end of the seat, on the south side of the dummy. A two-horse express wagon, driven by one Williams, had crossed the northern track, and was standing on the southern track, at a point about one hundred and fifty feet from Kearny Street, at the time the dummy in question started; the wagon was so cramped that the horses were headed toward the north track, their heads projecting so far over it that the approaching dummy would have struck them, and the rear end of the wagon pointed obliquely down the hill, also toward the northern track.

As the dummy came up to the wagon two passengers seated on the southerly seat jumped over the back of the seat; as the rear end of the dummy came up a hind wheel of the wagon collided with the dummy, and Cook received injuries from which he died. This action was brought to recover damages, and the jury returned a verdict for plaintiff for $8000. Judgment was rendered accordingly, and from that judgment and from the order denying motion for new trial defendant appealed.

First—The defendant presents the point that the evidence was insufficient to justify the verdict, and claims that the evidence shows that the collision was the result of carelessness or negligence on the part of the driver of the express wagon, and that the driver of the dummy used due diligence in endeavoring to avoid a collision. There is some conflict in the evidence as to whether the collision was immediately caused by the backing down of the wagon against the dummy, and the defendant insists that, as the forward part of the dummy passed the wagon without collision, the wagon must have been backing. There is also a conflict in the evidence as to the distance which would have intervened between the wagon and dummy if the wagon had remained stationary; one witness says three or four inches; another, one and a half or two feet; another, two feet; another, three or four feet. The answer of the defendant contains the allegation that "the said horses attached to said wagon were unmanageable and balky, and the brake on said express wagon was out of repair, and unsuited and unfit for the objects and purposes of a brake." The dummy driver testified regarding the horses attached to the express wagon: "My impression was that it was a balky team; I

thought it was a balky team; I did not know; there is no dependence to be placed in balky horses; they are liable to scare at anything; I got the impression that it was a balky team as I was drawing up near the wagon, some little time after I started; my mind was still more confirmed that it was a balky team when I got within thirty feet than before; I ordered him to turn away his horses; when he turned his horses I thought I could go by, and I then started at full speed; when the horses commenced to back I stopped; I tried to stop because I knew that if I kept on going, and the wagon kept on coming back, there would be something terrible happen—some hard crushing of the wagon and car, if they would run together." Let it be conceded that the dummy and car could possibly have passed the wagon if the latter had remained stationary, yet, as the wagon and horses were diagonally across the southern track, in the form of two sides of an angle, it being necessary to move the horses in order to pass them, the dummy driver having observed the position in ample time to stop, as but a narrow space would at best intervene between the wagon and the dummy, as the dummy driver believed the horses to be balky and perhaps uncontrollable, and as, from the relative positions, the backing of the horses must have forced the wagon against the dummy, it was for the jury to determine whether a proper degree of prudence and caution would not have required the dummy driver to stop until the horses and wagon could be moved to a safe distance, rather than to go on, as he says, at full speed, and take the risk of the backing down of the horses. There was a safe course open to the dummy driver; there was also a course open, full of risk and peril, to the persons and lives of passengers. He took the latter course, in the face of instructions he says he received from the company, "not to take any desperate chances, or to take any great risks, so far as endangering property or persons was concerned." The question of negligence was submitted to the jury under instructions as favorable to the defendant as it could ask, and under instructions it did ask for, and as there was evidence from which it might infer negligence, we will not disturb the verdict.

Second—The defendant alleges errors of law occurring at the trial and excepted to:

1. The plaintiff was allowed to testify that it was the usual custom of deceased, during his married life, to be at home after business hours, and that they had lived a happy married life; that for eight years prior to his death she had been an invalid and unable to leave the house; and that during that time he had been very kind and attentive, and that she was dependent upon him.

2. The daughter of deceased was allowed to testify that he was kind as a father; that the social and domestic relations as to

the family, on his part, were happy, and that he was kind and loving to plaintiff.

3. The plaintiff was permitted to testify that after Mr. Cook had been taken to his home she discovered pieces of flesh.

The first and second points above stated are fully covered by Section 377, C. C. P.—"Such damages may be given as under all the circumstances of the case may be just,"—and by the decision of this court in Beeson *v.* Green Mountain G. & S. Co., 57 Cal. 20. We are asked to review that case, and change or modify the views therein expressed. We decline to accede to that request; on the contrary, we here follow them. The plaintiff sued as heir at law and as administratrix; in both respects testimony of plaintiff's relations with deceased was admissible; in the latter respect, testimony as to the relations of the father and daughter was admissible. The defendant claims that the admission of the testimony referred to in the third point above was error, in that it would be to show the suffering of the deceased, and damages therefor could not here be recovered. There is nothing in the case to show that any damages were asked or given for suffering borne by the deceased; the action was for negligently causing his death, and the evidence given was of circumstances attendant upon the injury.

Third—The defendant claims that the damages were excessive. The testimony shows that the deceased was fifty-nine years old, the surviving family consisting of his widow and daughter, twenty-three years of age; that he was a game and poultry dealer, and made a good, comfortable living for himself and family. The verdict was for $8000. That sum of money at the statutory rate of interest would produce $560 a year—some $46 a month. The plaintiff being an invalid, and having been for years dependent upon her husband, we cannot, as law, say that the amount given is more than, "under all the circumstances of the case," is just.

Judgment and order affirmed.

We are asked to give damages on affirmance. We cannot say that the appeal was taken for delay; we therefore decline to add damages as a penalty.

We concur: Thornton, J., Sharpstein, J.

Terre Haute and Indianapolis R. R. Co.

v.

Andrew Jackson.

(Advance Case, Indiana. May 9, 1882.)

This action was for injuries alleged to have been sustained by the appellee whilst a passenger on the train of the appellant. The injury consisted in the throwing of a jet of water from a water-tank on the appellee. It being charged in one paragraph of the complaint that it was done wrongfully and purposely

by the servants of the appellant in charge of the train, and in a second paragraph that it was done carelessly and negligently.

(1.) The doctrine is now well settled that a corporation is liable for the wilful acts and torts of its agents, committed within the general scope of their employment, as well as acts of negligence; and that the corporation is thus bound, although the particular acts were not previously authorized, nor subsequently ratified by the corporation. (88 Ind. 116; 73 Ind. 430.) It is therefore immaterial whether the conductor or brakeman had been required or authorized to wash out cars of the company for any purpose. For the purpose of carrying the passengers safely the appellant was represented by its agent and if they did anything inconsistent with that safety, appellant is liable. The drenching of a passenger with water, either negligently or wilfully, is a clear and direct breach of the duty to carry safely.

(2.) The record shows that after the jury had retired and had been deliberating on their verdict for about nine hours, the court, without the knowledge or consent of the appellant, caused the jury to be informed, through the bailiff having them in charge, that if they did not agree on a verdict the court would keep them there until Saturday night, a period of four days, to which action of the court the appellant at the proper time excepted. This action of the court cannot be justified. It constituted, as it must have been intended that it should, a kind of coercion on the jury, which was inconsistent with their proper independence.

WOODS, J.—The questions presented for decision in this case arise upon the overruling of the appellant's motion for a new trial.

This action was for injuries alleged to have been sustained by the appellee whilst a passenger upon a train of the appellant. The particular injury charged was the throwing of a jet of water from a water-tank upon the appellee, it being alleged in one paragraph of the complaint that it was done wrongfully and purposely by the servant of the appellant in charge of the train, and in a second paragraph that it was done carelessly and negligently. After reviewing the evidence, counsel for the appellant says:

"All these circumstances seem to show conclusively that if there was any intention on the part of any one to wet Mr. Jackson, it was confined solely to Dougherty. He spoke of it before leaving Filmore. He alone hinted anything about the half-dollar, and he alone was instrumental in getting Jackson to go to the door of the caboose. The testimony, as a whole, justifies the conclusion that Jackson was wet while Rockwell was letting some water into the caboose from the tank for the purpose of washing it out, so as to render it suitable for him and the brakeman to sleep in that night at Indianapolis; and that had not Jackson been standing in the door of the caboose, he would not have been wet. Under this state of facts the verdict should have been for the defendant.

"Whilst it is true, that a railroad company is liable for the wilful acts of its servants done within the scope of their employment and whilst in the discharge of their duty, it is not responsible for the wilful acts of its servants, done when not acting within the scope of their employment.

"There is not a syllable of testimony showing that the conductor

or brakemen of a freight train are required or authorized to wash out the cars of the company, for their private accommodation."

Rockwell was the conductor and Dougherty a brakeman in charge of the train. The doctrine is now well settled: "That a corporation is liable for the wilful acts and torts of its agents, committed within the general scope of their employment, as well as acts of negligence; and that the corporation is thus bound, although the particular acts were not previously authorized, nor subsequently ratified, by the corporation." The Jeffersonville R. R. Co. v. Rogers, 38 Ind. 116; the American Express Company, 73 Ind. 430; and cases cited.

It is therefore immaterial whether the conductor or brakeman had been required or authorized to wash out the cars of the company for any purpose.

The appellant had undertaken to carry the plaintiff as a passenger upon its train and was bound to do it safely. For this purpose the appellant was represented by its agents in charge of the train, and if they did anything inconsistent with the safe carriage and delivery of the plaintiff, at his destination, unharmed, the appellant, upon the plainest principles of law, as well as good policy, is liable for the injury. The drenching of a passenger with water, either negligently or wilfully, is a clear and direct breach of the duty to carry safely, and it is immaterial, upon the question of the company's liability, whether it resulted from the fault of the brakeman alone, or of the conductor, or of both of them. They were each agents of the company for the running of the train, and the company, therefore, is responsible for the acts of either, or both, in so far as such acts affected the passenger. It follows that if the conductor was faultless in raising the valve, and in throwing the water into the caboose, which could hardly be when he knew there was a passenger there liable to be injured—and the brakeman designedly procured the plaintiff to go to the door of the caboose, in order that the water might strike him, the company is clearly liable for the injury. That the evidence tends to show this state of facts, is not disputed. It is next insisted that the jury awarded excessive damages. We can by no means say so. The plaintiff, over the objection of the appellant, was permitted to prove by a competent witness a declaration of the brakeman Dougherty, made to a fellow brakeman, on the train, but some distance from and some hours before the arrival of the train at the place where the injury was incurred, to the following effect: "I will tell you how we will get some tobacco. This old man with the hogs looks like a liberal old fellow, and we will tackle him for a half dollar, for watering his hogs, and if he don't come down we will give him a wetting." We are of the opinion that this declaration of the purpose of the brakeman to do the act complained of, made during the performance of the duty to carry the plaintiff, which the company had

undertaken, through Dougherty's agency, to perform, was competent.

It tended directly to prove the averment that the wrong was wilfully inflicted, as charged in one paragraph of the complaint; and there was other evidence tending to show that the brakeman communicated his purpose to the conductor, and that the two acted in concert for the purpose of accomplishing the wrongful act. After the act was done and past the brakeman could not, of course, make a declaration which would be competent evidence against the company; but under the issues his purpose in doing the act was material, and it would seem that there could be better evidence of that purpose, thus his own declaration made as in this instance the evidence in question shows it was made. It is next insisted that the court erred in refusing to strike out the testimony of a witness, who testified that some months after the alleged injury the plaintiff fell in front of the witness' store and cut his hand considerably. The plaintiff testified that some years before the injury complained of he had been subject to spells of dizziness or vertigo; of which, however, he had been for a long time free, and that after the injury there was a recurrence of this or similar trouble, and, as an instance of its effect upon him, detailed the fall testified to by the other witness. The argument made against this testimony is, that it was not supplemented by medical or scientific evidence that the injury suffered might have produced the alleged consequences. It is plain, however, that this is no argument against the competency, however good against the force of the evidence.

Jurers have a right to draw inferences on such subjects from pertinent proofs, in the light of common experience unaided by doctors or other scientists.

The complaint specifically charged that the plaintiff did suffer, in consequence of the wrong done him, a nervous shock and a recurrence of dizziness and vertigo; and in support of this averment it was competent to show the fall referred to by the witness. Whether the proof of the injury received in the fall was admissible is quite a different question, which we are not called on to decide. Questions are made in reference to instructions given and refused, but in the main they are covered by what has been said; and, as the judgment must be reversed on other grounds, we will not examine them.

The record shows that after the jury had retired and had been deliberating on their verdict for about nine hours the court, without the knowledge or consent of the appellant, "caused the jury to be informed through the bailiff having them in charge, that if they did not agree upon a verdict, the court would keep them there until Saturday night, a period of four days, to which action of the court, the defendant, at the proper time, as soon as her attorneys learned of such action, objected and excepted." This action of the

court cannot be justified. It constituted, as it must have been intended it should, a kind of coercion upon the jury, which was inconsistent with their proper independence.

Counsel for the appellee conceding that the action of the court "may have been discreet," insist that it does not appear that it was prejudicial to the appellant, and that we must presume that it was harmless. But we cannot so treat the matter. A plain error is committed. Its plain tendency was to influence the jury. The judge intended to influence them, else he would not have sent the message. It is not apparent how the appellant could show that any or what harm resulted. Under the circumstances the presumption is that the jury was influenced, and, if any showing was possible or admissible, it should have come from the appellee.

The judgment is reversed with costs, and with instructions to grant a new trial.

EVANSICH

v.

GULF, COLORADO AND SANTA FÉ R. R. Co.

(*Advance Cast. Texas, May*, 1882.)

Plaintiff, a boy of seven years, had his foot crushed by a turn-table of defendant, upon which he and other boys were playing. The defendant was not using the table at the time, and had no one in charge of it. The plaintiff and the other boys put the table in motion for their own amusement. *Held*, that the rule which applies to adults in reference to contributory negligence cannot be applied to infants of tender years.

HUME & SHEPARD, for appellee, cited:

McAlpin *v.* Powell, 70 N. Y. 126; R. R. Co. *v.* Bell, 81 Ill. 76; R. R. Co. *v.* Henigh, 26 or 27 Kansas, 10 C. L. I. 2; Cauley *v.* R. R. Co. (Sup. Ct. Pa., 1880), 11 Reporter, 67; Smith *v.* Hestonville R. Co., 92 Pa. St. 450; Morrissey *v.* East R. Co., 126 Mass. 377; Lyons *v.* Brookline, 119 Mass. 491; Tigh *v.* Lowell, Id. 472; Wright *v.* Malden R. Co., 4 Allen, 283; Callahan *v.* Bean, 9 Alen, 401; Victory *v.* Baker, 67 N. Y. 366; Hartfield *v.* Roper, 21 Wendell, 615; Wood *v.* Ind. School Dist., 44 Iowa, 27; Honor *v.* Albrighton, 93 Pa. St. 475; Hughes *v.* McFie, 2 Hurl & Colt, 744; Mangan & Atherton, L. R., 1 Ct., Exchq. 238; S. C., 4 Hurl & Colt, 388; Gautret *v.* Egerton, L. R., 2 C. P. 370; Stone *v.* Jackson, 32 Engl. L. & Eq. 349; Willsinson *v.* Fairre, 1 Hurl & Colt, 633; Lygo *v.* Newbold, 24 Eng. L. & Eq. 507; Loftus *v.* Union Ferry Co., 84 N. Y. 455; Glossey *v.* R. R. Co., 57 Pa. St. 172.

STRAYTON, J.—This action was brought by F. G. Evansich, Sr., as next friend of his son, F. G. Evansich, Jr., a child seven years of age, to recover damages for an injury alleged to have been received by the son on the 18th day of April, 1880, on a turn-table owned by the railway company, which was alleged to be in a public place, and very near to a public street, in the city of Brenham, and that was uninclosed, unguarded, unlocked, and easily put in motion by children. The petition set out fully the manner in which the injury was received, the character of injury received by the child, and the negligence of the railway company.

The appellee answered by general demurrer and by special demurrers; also by general denial and by special answers. The demurrers were sustained, and the cause dismissed.

As a special ground of demurrer it was urged that the father, as next friend, could not maintain the action for his minor son.

This action having been instituted since the adoption of the revised statutes, the father could institute and maintain it. Abrahams *v.* Volbaum, 54 Tex. 227; Brook *v.* Clarke, 4 Tex. (Law Journal), 797.

Affirmed at the present term of this court.

In addition to a general demurrer there was a special demurrer, which was as follows:

"The said petition is insufficient in law, because it appears from the allegations thereof that if plaintiff has been injured or damaged, the same was caused wholly by his own contributory negligence and wilful trespass upon the property of defendant."

The petition in this cause is very full, and, tested by the principles set forth in many well-considered cases by courts of high authority, must be considered as sufficient. The same rule which applies to persons of sufficient age to have discretion sufficient to protect themselves, in reference to contributory negligence, cannot be applied to infants of tender years; and, in reference to them, the negligence of a party, through whose want of care they receive injury, will fix liability, notwithstanding the act of the infant may have been such as would defeat a recovery by an adult receiving an injury under the same circumstances.

In the case of R. R. Co. *v.* Stout, 17 Wallace, 660, the rule is thus laid down: "It is well settled that the conduct of an infant of tender years is not to be judged by the same rules which govern that of an adult.

"While it is the general rule in regard to an adult—that, to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault—such is not the rule in regard to an infant of tender years.

"The care and caution required of a child is according to his maturity and capacity only, and this to be determined in each case by the circumstances of that case." The defence urged in the case

above cited was the same as in this case, the facts were almost identical, and the defence was held insufficient. In the following cases—K. C. Ry. Co. *v.* Fitzsimmons, 22 Kansas, 687; Koons *v.* St. Louis and Iron Mountain R. R., 65 Mo. 592; Keefe *v.* Milwaukee and St. Paul Ry. Co., 21 Minnesota, 207—the facts and pleadings were substantially the same as in the present, and the plaintiffs were held entitled to recover.

The petition in this cause negatives the idea of negligence upon the part of the parents of the child injured; shows that the turn-table was in a public place, and very near to a public street; that children were accustomed to play on the turn-table; that on the same day on which the injury was inflicted, and but a short time before the child was injured, another child was injured, of which the servants of the appellee had notice; that no steps were taken to so secure the turn-table that children could not revolve it, and thereby receive injury; that the injured child was only seven years of age, and wanting in that discretion necessary to its own protection. Such facts entitled the plaintiff to maintain the action, and if proved, to a recovery.

The question of discretion in the child, and of consequent responsibility for negligence, was not one for the court, and to be determined upon demurrer, but was for the jury.

"In no class of cases can this practical experience (of juries) be more wisely applied than in that we are considering. We find accordingly, although not uniform or harmonious, that the authorities justify us in holding in the case before us that, although the facts are undisputed, it is for the jury and not for the judge to determine whether proper care was given or whether they establish negligence." R. R. Co. *v.* Stout, 17 Wallace, 664.

A court cannot declare as a matter of law that a child of seven years is sui juris, and when, from the age of the child, there may be doubt upon that question, it should be submitted to the jury. 2 Thompson on Negligence, 1181, 1182, and citations.

The fact that the turn-table was upon the premises of the appellee does not affect the question, nor relieve it from the duty of exercising in reference thereto such care as will render it not a dangerous machine to children, who are attracted to it for amusement.

For the error of the court in sustaining demurrers and dismissing the cause, the judgment of the court below is reversed and the cause is remanded.

See note, vol. 4. p. 559.

PHILADELPHIA AND READING R. R. CO.

v.

CARR.

(*Advance Case, Pennsylvania. February* 20, 1882.)

It is not always contributory negligence per se for a traveller to attempt to cross a railway track without waiting until a train, which has just passed, has gone so far as not to obstruct his view of another train approaching on a parallel track in an opposite direction.

A. was walking along the street of a city, which was crossed by the tracks of a railroad. Seeing a train approaching on the track nearest to her she paused to let it pass. As the last car passed her she looked both ways, and also listened, but heard nothing to alarm her, and accordingly when the rear end of the train, which had just gone by, was about a car's length off attempted to cross the track. On the way she tripped and fell upon the track immediately beyond that on which the train, which had just passed, had been running, and after lying there prostrate about a quarter of a minute was run over and injured by a train approaching from the opposite direction. The engine of the train by which she was injured passed the rear car of the first train she had observed about three hundred feet from the scene of the accident. A., having brought suit against the railroad company to recover damages for the injury done her, the defendant requested the court to charge that the plaintiff had been guilty of contributory negligence in attempting to cross while the train, which had just passed, prevented her seeing the incoming train by which she was injured. The Court declined so to charge, but left the question of the plaintiff's contributory negligence to the jury.

Held, that, under the circumstances, this was not error.

ERROR to the Common Pleas No. 2, of Philadelphia County.

Case, by Patrick J. Carr and Mary Ann his wife, in right of said wife, against the Philadelphia and Reading R. R. Co., to recover damages for injuries alleged to have been occasioned to the plaintiff Mary Ann by the negligence of defendant's servants.

On the trial, before Hare, P. J., the following facts appeared: On the evening of June 2, 1878, between half-past nine and ten o'clock the plaintiff Mary Ann started to walk westwardly along Diamond Street, in the city of Philadelphia. Said Diamond Street is crossed diagonally between Ninth and Tenth Streets by the tracks of the Philadelphia, Germantown, and Norristown R. R., which is leased and operated by the company defendant.

Said tracks are four in number, parallel with each other. They extend in a straight line from the Diamond Street crossing, about three hundred feet, to a point where they cross Tenth Street, and continue on straight beyond Tenth Street for a considerable distance.

As plaintiff, on the night in question, approached the Diamond Street crossing she observed a train approaching on the eastern

track of the railroad which was moving up towards Tenth Street. Before attempting to pass she paused and let the train go by. When the train had gone by plaintiff testified that she remained where she was, looked in both directions and listened, but heard nothing to alarm her. When the last car of the up-train was about a car's length past the crossing she attempted to cross the tracks. In stepping over the track, however, immediately next to and west of that on which the train had just passed she slipped and fell, and while still lying there, within about fifteen seconds after her fall, was run over and seriously injured by a train moving down that track, the engine of which had passed the last car of the up-train very close to the Tenth Street crossing. The evidence in the case is recited at length in the opinion of the Supreme Court.

Defendant requested the Court to charge as follows: The fact that a traveller stops and waits until a passing train gets by does not absolve him or her from looking or listening for trains approaching upon the other track in an opposite direction, and a traveller waiting for a train passing in one direction must wait sufficiently long so that that train shall not prevent him or her seeing a train approaching in an opposite direction. If, therefore, the jury believe that Mrs. Carr, after stopping east of the railroad at Diamond Street while the out-train was passing, started across at a time when that train prevented her seeing the incoming train, she was guilty of negligence, and cannot recover.

Answer. I have already told you that it was Mrs. Carr's duty on approaching the track with a view of crossing it to look and listen, to look in both directions, and listen for the approach of trains on either side, and I also said, or it was a necessary inference from it, that if she was delayed, as she was delayed in this case, by any cause—the approach of the up-train in the case in hand—it would be her duty again to look in both directions and listen before setting out. I am asked to say to you, however, that if under those circumstances a train which passed up the road shut out any portion of the road from view, it would be her duty to wait until that obstacle to vision was removed, and that if she did not do so, it would necessarily be negligence, and preclude her recovery. What I say is, that it would have been a wise and proper precaution as the event shows. Whether the omission of that precaution be negligence would depend upon circumstances, and I am not willing to take upon myself the responsibility of saying that under the circumstances in this case she would necessarily be guilty of negligence in not waiting until the view of the other track was entirely clear. That is for the jury to consider. If the jury find that she was negligent, then the consequence would follow which has been already stated.

Verdict and judgment for the plaintiffs in the sum of $8000.

Defendant thereupon took this writ, assigning for error the answer of the Court to the point above cited.

Thomas Hart, Jr., for plaintiff in error.

The instruction asked for is the necessary result of the decisions. A traveller must look in both directions. He must look at a place where he can see. He must look at a time when he can see. The obstruction to vision here was not one of place, it was one of time —a moving object which in an instant would have passed and revealed the incoming train. The plaintiff was bound to wait till this obstruction was removed. Had she waited a few seconds, the accident would not have occurred. Hanover R. R. Co. *v.* Coyle, 5 Smith, 396; Penna. R. R. Co. *v.* Beale, 23 Smith, 504; Central R. R. Co. *v.* Feller, 3 Norris, 226; Penna. R. R. Co. *v.* Werner, 8 Norris, 59; Schultz *v.* Penna. R. R. Co., 6 Weekly Notes, 69.

Daniel Dougherty, for defendant in error.

GREEN, J.—The rule which requires of one who is about to cross the track of a railroad, that he shall stop and look both ways and listen before stepping on the track, is a wise and salutary rule. If it were really observed in every instance, accidents at such crossings would be almost if not quite impossible. Experience constantly teaches the necessity of enforcing the rule by visiting the penalty of contributory negligence rigidly upon those who disregard it. The safety of passing trains and the lives of passengers travelling therein, which are always endangered when obstructions of any kind are upon the track, are of quite as much consequence as the safety and the lives of those who occupy the track, even in the momentary act of crossing it. In the present case the charge of the learned judge of the court below is not printed, but, so far as we can gather from the answers to the points submitted, he seems to have impressed upon the jury with emphasis the full terms and import of the rule above stated. But a single error is assigned, and that is to the answer given by the Court to one of the points of the defendant. The point was in the following words: "The fact that a traveller stops and waits until a passing train gets by does not absolve him or her from looking and listening for trains approaching upon the other track in an opposite direction, and a traveller waiting for a train passing in one direction must wait sufficiently long so that that train shall not prevent him or her seeing a train approaching in an opposite direction. If, therefore, the jury believe that Mrs. Carr, after stopping east of the railroad on Diamond Street, while the out-train was passing, started to cross at a time when that train prevented her seeing the incoming train, she was guilty of negligence and cannot recover."

The point was thus answered: "I have already told you that it was Mrs. Carr's duty on approaching the track with a view of crossing it to look and listen, to look in both directions, and listen

for the approach of trains on either side, and I also said, or it was a necessary inference from it, that if she was delayed in this case by any cause, the approach of the up-train in the case in hand, it would be her duty again to look in both directions and listen before setting out. I am asked to say to you, however, that, if under those circumstances, a train which passed up the road shut out any portion of the road from view, it would be her duty to wait until that obstacle to vision was removed, and that if she did not do so it would necessarily be negligence and preclude her recovery. What I say is that it would have been a wise and proper precaution, as the event shows. Whether the omission of that precaution be negligence would depend upon circumstances, and I am not willing to take upon myself the responsibility of saying that, under the circumstances in this case, she would necessarily be guilty of negligence in not waiting until the view of the other track was entirely clear. That is for the jury to consider. If the jury find she was negligent, then the consequence would follow which has been already stated." Was there error in this answer? In a possible condition of the facts of the case it might not have been erroneous simply to affirm the point. It probably would not have been if the train going out had been at rest at, or close to, the point of crossing, for then it would have been a physical obstacle which manifestly obstructed vision on the other track. The conspicuous and palpable character of the obstacle would be direct notice to the plaintiff that she could not exercise her faculty of vision in that direction, and the effect would have been precisely the same as if the obstruction had been of a fixed and permanent character. The case would thus have been brought within the ruling in Railroad *v.* Feller (3 Norris, 226). There the obstruction was a watch-house, and we held the party guilty of contributory negligence, because, although he stopped and looked while in front of it, his looking in one direction was a vain act and could yield him no information. The same doctrine was held in Railroad *v.* Beale (23 P. F. S. 504). But here the train going out was not at rest, nor was it at the point of crossing. It had gone beyond the crossing. All the witnesses to the accident agree in this. As to the precise distance it had gone before the locomotive of the down-train passed the rear end of the up-train, the testimony is not very distinct. The plaintiff, who had stopped on the east side of the road to await the passage of the up-train, says that after the train had passed she stopped long enough to look, and did look, first up the road and then down, and listened and heard nothing, and then started to cross. She was asked—

Q. Where was the train that was going out when you started to go across?

A. It was a little distance the other side of Diamond Street. I

could not tell you how far, but I saw the back of it was some distance to the other side of Diamond Street, the end of the car.

Q. Some distance the other side of Diamond Street, you say, the back end of the car?

A. Yes, sir; anyhow, a car's length, or about that distance. I couldn't tell you exactly; it might be more.

Q. I want to get to that as clearly and closely as I can.

A. That is as close as I can give it to you. It might be more. It was not less, but it might be more.

Q. You saw the end of the car?

A. Yes, sir.

Q. You think it was about a car's length on the other side of Diamond Street?

A. Yes, sir; it might have been more. I won't swear that it was just a car's length, but it might have been more than a car's length.

Q. How long, in point of time, did you stop there after the train had passed?

A. I didn't stop any longer than to see that my way was clear, and that there was nothing in my way.

F. J. Ryan, a witness for the defendant, said: "From the woman, where she fell to where the hind end of the train passed, was about one hundred steps," and added that he stepped it off himself. He had previously testified: "The up-train passed right about, I think, five hundred yards away from the crossing at the time the cow-catcher passed the hind end of the up-train."

Joseph Ryan, another witness for the defendant, testified: "The train had got up above Tenth Street, as the down-train was about approaching Tenth." Being further examined, he said: "The down-train passed the hind end of the up-train about five yards above Tenth Street."

Q. Five yards to the north of the Tenth Street crossing?

A. Yes, sir.

Q. Can you tell where the engine of the down-train was when Mrs. Carr slipped and fell?

A. The engine of the down-train was on the north side of the Diamond Street crossing.

John Touser, another witness for the defendant, testified:

Q. Where did the trains pass each other?

A. They passed each other just above Tenth Street crossing, about the flag-box there.

Q. Where you say they passed each other, do you mean to say the engine passed the hind part of the train?

A. The hind car of the up-train passed the engine of the down train.

Several witnesses testified that the defendant fell on the track of

the down-train, the west track of the road, and while lying there with her head and body beyond the west rail of the west track, and her feet, or one of them, between the rails, she was run over by the engine of the down-train and one foot was cut off. The witness, Joseph Ryan, in his cross-examination, testified:

Q. You say she fell and was lying on the track?

A. She fell on the down-track; yes, sir, she slipped and fell on the down-track.

Q. How long was she lying there before the engine struck her?

A. As near as I can recollect, about ten, or thirteen, or fifteen seconds.

Harry J. Gilmore, another witness for the defendant, testified that he was watchman at the Tenth Street crossing, which he said was about a hundred steps from the Diamond Street crossing, and that he saw the accident. He said: "After the other train (the up-train) had passed and as the other train coming down came to my crossing, I saw the lady cross over, and the lady fell about the time the engine had passed me. By that time, when the engine had got down on to that crossing, that kept most of the light from me, so that I could not see much more."

Q. Where were the trains as they passed your crossing; that is, where did the engine of the down-train pass the hind part of the other train?

A. Just before it struck my crossing, the upper side of my crossing. The rear end of the up-train had crossed to my crossing about the time that the down engine was coming to my crossing.

John Welch, the engineer of the down-train, testified that his engine passed the rear end of the up-train just about the end of the planks of the Tenth Street crossing, and that his engine was about thirty feet from the plaintiff when she fell.

There was other testimony as to the details of the occurrence, but we have quoted enough for the purpose of disposing of the present question.

The defendant asked the court to say by the point in question that "If, therefore, the jury believed that Mrs. Carr, after stopping east of the railroad at Diamomd Street while the out-train was passing, started across at a time when that train prevented her seeing the incoming train, she was guilty of negligence and cannot recover."

It is true the hypothesis of the point is the inability of the plaintiff to see the incoming train on account of the outgoing train when she attempted to cross, but the point itself is not an abstract proposition. It is not the declaration of a mere legal principle, nor is it even the application of a legal principle to an absolutely fixed and definite condition of facts. In the concrete, the proposition of the point is to fix a definite legal consequence of negligence upon this plaintiff, not for doing or omitting to do something in a precise

and determinate state of facts, but in a condition of things which, in essential features, is indeterminate and uncertain. To illustrate: if, while the outgoing train was at rest, or if, on the very instant of its passing, the plaintiff attempted to cross, she might very well be subject to a rule of duty which would be entirely inapplicable if the train were half a mile away. The rate of speed of each train would also be an element in the problem which the point entirely ignores. Now it seems clear that the outgoing train was a hundred yards, or thereabouts, distant from the point of crossing when the engine of the down-train passed its rear. How would it be possible for a court to say, as matter of law, that the plaintiff would be guilty of negligence if she crossed the track knowing that she could not see an incoming train at that distance? The court did leave it to the jury to say whether it was negligence in fact for her to cross in such circumstances, and certainly nothing more than that she could be asked on behalf of the defendant. As a matter of fact it can scarcely be questioned that it is easily possible for one to step across a railroad track in safety, although a train is approaching at a distance of three hundred feet. In truth it would seem, from the testimony, that the accident in this case was due to the fact that the plaintiff stumbled and fell upon the track and remained prostrate from ten to fifteen seconds before the train reached her, rather than to a lack of time to get across the track. These considerations take the case entirely out of the domain of legal control by the application of a fixed rule, which determines negligence as the necessary consequence of definite action or non-action in precise circumstances.

The learned judge said all that could be said when he charged that the act of the plaintiff in crossing as she did might be negligent according to the circumstances, and the force of these he properly left to the determination of the jury. In this there was no error. We think the time has arrived when it would be well for all railroad companies whose tracks cross the streets of cities and towns at grade, to protect all the street crossings with gates. The growing practice in this direction deserves commendation.

Judgment affirmed.

The case above reported raises a very interesting and somewhat novel question in the law of contributory negligence. Upon comparison with the analogous cases awarded in other States the conclusion reached by the Supreme Court of Pennsylvania will be found to be in accord with the general drift of authority. It is conceived that a brief statement of these analogous cases, together with some comment upon them, may prove both of interest and value.

As a general rule, the law may be said to be, that where the view of a railroad track at a highway crossing is obstructed by any means, so as to render it difficult or impossible to learn of the approach of the train, then the question whether or not a traveller upon the highway has been negligent in attempting to cross the track is for the jury and not for the court. Artz

v. Chicago, R. I. and P. R. R. Co., 34 Iowa, 153. An apt illustration of this rule is afforded in Besiegel v. N. Y. Central R. R. Co., 34 N. Y. 622. In that case the plaintiff, upon approaching a railroad crossing, stopped to allow a long freight train to pass by. Immediately after, he attempted to cross the track, and while doing so was knocked down and injured by a moving train. It appeared that the plaintiff's view of the train which injured him had been obstructed by a train of freight cars standing on the track. There was no signal of any kind made by the approaching train to warn the plaintiff of his danger. The court said: "Upon the undisputed facts of the case, the plaintiff could have avoided the accident by exercising a little more precaution before he stepped on to the third track. If the freight cars had not intercepted his vision, he might have seen the engine approaching from the east in time to have avoided the collision." It held, nevertheless, that taking all the circumstances into account, the question of his contributory negligence in the premises had been properly submitted to the jury.

A similar conclusion was reached under almost identical circumstances in an elaborate opinion in the recent case of Bunting v. Central Pacific R. R. Co., 14 Nev. 351. In some courts a traveller is held to a very lax measure of duty in these cases. In McGuire v. Hudson River R. R. Co., 22 Daly (N. Y.), 76, it was said:

It is negligence for a railroad company to permit its cars to stand upon and obstruct a public street, and where, by reason of such obstructions, the view of the track in one direction is cut off, and it is rendered impossible for a person to see a passing train, it is not negligence as matter of law for that person to omit to look in the direction, the view of which is obstructed, before attempting to cross.

In most of the States it seems to be admitted that railroad companies may erect buildings or other obstructions at or near crossings, so as to obstruct the view of approaching trains, without being necessarily guilty of negligence per se. Central R. R. Co. v. Feller, 84 Pa. St. 226. Where they do this, however, they will be held bound to take such precautions and give such warnings as the enhanced danger renders necessary and prudent. Cordell v. N. Y. Cent. and Hud. River R. R. Co., 75 N. Y. 330; Mackay v. N. Y. Cent. R. R. Co., 35 N. Y. 75; Richardson v. N. Y. Cent. R. R. Co., 45 N. Y. 846.

This extra measure of duty on the part of the railroad company is of course attended by a corresponding decrease in the measure of duty on the part of travellers crossing the track; but this decrease is only slight. See in this connection Cordell v. N. Y. Cent. and Hud. River R. R. Co. (supra), where the facts were these: Plaintiff's intestate attempted to cross a railroad track at a locality with which he was thoroughly familiar, and which was occasionally used as a crossing. There was a pile of roots and stumps erected by the railroad company close at hand, so that he could not see more than about forty feet down the track. There was no evidence whatever as to his stopping, listening, and looking, but it did appear that in crossing he turned his face steadily up the track. He was struck and killed by a train coming down the track. Under these circumstances, suit having been brought by his administrator against the company, a non-suit was held to have been properly awarded.

The principal cases upon this point have involved the question of the obligation of the driver of a team approaching a railway crossing, and the decisions have been such as to seriously impair, it must be admitted, the universality of the general rule first above laid down.

In some cases it seems to be held that where there is any obstruction to the view of the track, either natural or artificial, it is the duty of the driver of an approaching team to get out and walk ahead to the track. If he fails to do so it is said that he is guilty of contributory negligence per se. Pennsylvania R. R. Co. v. Beale, 73 Pa. St. 504.

Where, however, no end could be subserved by such action and no

greater safety secured, it is clear that it is not requisite. Where, therefore, it appeared that if the driver had gone forward to the track he could have seen down it only a distance of about forty rods, which space a train could readily have traversed before he could have regained his wagon and crossed the track, it was held that such driver might recover for an injury, even though he had failed to stop, look and listen in any manner. Mackay v. N. Y. Cent. R. R. Co., 35 N. Y. 75. It should be observed, however, that in this case the obstructions complained of consisted of buildings and piles of boards erected by the company. Its negligence in raising such obstructions was strongly stigmatized by the court and had no doubt some effect on the decision.

In Dolan v. Delaware and Hudson Canal Co., 71 N. Y. 285, another view of this question was taken. In that case it appeared that the plaintiff who was driving a team upon the highway stopped as he approached the railway crossing and listened, but did not alight from the team and go forward to the track. His view was obstructed partly by warehouses on the side of the track, partly by cars standing upon the railway company's track; said company was required by law to provide a flagman at every crossing, but in this particular instance had failed to take that precaution. The plaintiff in attempting to cross the track was injured, and it was held that under the circumstances it was for the jury to say whether or not he had been guilty of contributory negligence in the premises.

According to some authorities the driver of a team is in no case bound to leave it in order to inspect the track. "This," said the court in Duffy v. C. and N. Ry. Co., 32 Wis. 274, "would be exercising extraordinary care and diligence, greater than the law imposes upon him." A somewhat similar conclusion was reached in Richardson v. N. Y. Central R. R. Co., 45 N. Y. 846. Here the plaintiff as he approached the crossing found his view obstructed by a deep cut through which the railroad ran, and by a watch house erected by the railroad company. He did not leave his team, but rose in his wagon, looked and listened. The noise of falling water close at hand prevented him from hearing an approaching train, by which, in attempting to cross the track, he was run over and injured. It was held that his conduct had not been such as to preclude him from recovery.

Where the obstruction in question is of such a character as not to prevent a traveller from seeing an approaching train, its existence will not of course, exempt him from his bounden duty to stop, look, and listen. Salter v. Utica and Black River R. R. Co., 75 N. Y. 273. And where a traveller, when stopping to look, places himself so that an obstruction intervenes when he might in another position obtain a fair view of the track, he will be held not to have discharged his duty, and in case of injury will be precluded from recovering. Central R. R. Co. v. Feller, 84 Pa. St. 226. In some States it is held negligence per se on the part of the company to allow weeds and brush to grow upon their track, or to pile such weeds and brush so as to obstruct the view of travellers crossing the railroad. Rockford, R. I. and St. L. R. R. Co. v. Hillmer, 72 Ill. 235; Indianapolis and St. L. R. R. Co. v.———, 78 Ill. 112; Dimock v. Chicago and N. W. R. Co., 80 Ill. 338; Chicago, B. and Q. R. R. Co. v. Lee, 87 Ill. 454.

In 78 Ill. 112, supra, the court says: It was negligence in the company to permit or suffer weeds or anything else to grow upon its right of way to such a height as would materially obstruct a view of the highway. The safety of persons and property alike make it necessary the company should keep its right of way free from obstructions, so that persons approaching the crossing may readily ascertain whether there is danger, and the employees in charge may be able to discover whether there is anything on the track.

In these cases it is further held that a traveller is not bound to look out for

approaching trains, the view of which is in this manner obstructed. It should be remembered, however, that in Illinois the doctrine that a plaintiff who is guilty of slight negligence only may recover where the defendant has been guilty of gross negligence is in force, and this doctrine will be found to have some influence in the decisions cited.

It is, of course, perfectly clear that if the person injured has himself caused the obstruction to his view, its existence will not diminish his measure of duty. Where, therefore, a man wraps himself up so as to cover his eyes or ears, and in consequence on approaching a crossing fails to see or hear an approaching train, he will be held guilty of contributory negligence. Chicago and N. W. R. R. Co. v. Sweeney, 52 Ill. 325; Pennsylvania R. R. Co. v. Warner, 6 Weekly Notes of Cases (Phila.), 520; Hanover R. R. Co. v. Coyle, 55 Pa. St. 396.

In Roth v. Milwaukee and St. Paul R. R. Co., 21 Wis. 256, the facts were as follows: One of the defendant company's tracts connecting two depots near a city ran within six or eight feet of the top of steps leading to the basement of a flouring mill. Plaintiff's decedent passed over the track and down the steps into the mill, and soon after returned with two bags of flour on his right shoulder, which completely obstructed his view on that side. While attempting to recross the track he was killed by a train approaching from his right. *Held*, that he had been guilty of such contributory negligence as would preclude recovery.

The Philadelphia, Wilmington and Baltimore R. R. Co.

v.

Nathan Lehman and Abraham Lehman, trading as N. Lehman & Brother.

(56 *Maryland Reports*, 209. *April* 14, 1881.)

Cattle belonging to the plaintiffs were received from the B. and O. R. R. Co. at Baltimore, by the P., W. and B. R. R. Co., to be transported over its road. An action was brought by the plaintiffs against the P., W. and B. R. R. Co. upon the common law liability of the latter as a common carrier to recover damages resulting from an alleged delay in the transportation of cattle, on the part of the defendant. The declaration alleged that the cattle were received by the defendant on the 28th of July, 1878, about the hour of four o'clock P.M., and were by it detained upon its road in Baltimore until about half past twelve o'clock A.M., of the morning of Monday, July 29th, 1878. On demurrer, it was *held*:

1st. That although the declaration did not allege that the cattle were delivered to the defendant on Sunday, it was the duty of the Court to notice the days of the week upon which particular days of the month fall; and hence the Court knew without other averment that the 28th of July, 1878, was Sunday. And in the regular division of time, Sunday embraces all of the twenty-four hours next ensuing the midnight of Saturday.

2d. That our Sunday law, as found in the Code, Art. 30, Sec. 178, had no application to the case whatever.

3d. That according to the principles of the common law, applicable to common carriers, the defendant, having accepted the stock to be transported over its road in the usual course of transit, it at once became its duty to forward the same without unnecessary delay or detention.

4th. That its obligation was to carry, according to its public profession, and the conveniences at its command. And if injury were sustained by reason of any neglect of this duty, or other wrongful act in the carrying and delivery of the cattle, the fact of their having been received to be carried, or having been carried on Sunday, could afford no excuse to the defendant, or exoneration from liability.

5th. That the carrying forward of the cattle by the defendant on Sunday was not illegal; it was fairly and justly a work of necessity, and therefore excepted from the operation of the statute.

6th. That even upon the supposition that the plaintiffs were violating the law in having their cattle transported on a Sunday, the defendant could not avail itself of such infraction of the law by the plaintiffs, as a defence to an action for the consequences of a wrong or negligence of its own.

The cattle in question, after being received from the B. and O. R. R. Co., were carried by the defendant over its road to Philadelphia, and there delivered to the P. R. R. Co.; by which they were carried to Jersey City Stock Yards, their place of destination. They reached there too late for the market on Monday, and were not sold until Wednesday, which was the next market day. The defendant ran no regular freight trains on Sunday during the summer of 1878. But special trains were run on Sunday for the accommodation of the cattle trade, by an arrangement with the B. and O. R. R,Co.; and the usual course of dealing, as between the two companies, was for the B. and O. R. R. Co. to give notice by telegraph on Saturday, and again on Sunday morning, of what cattle there would be for transportation over the defendant's road during the day of Sunday. *Held:*

1st. That it was a question to be submitted to the jury, upon all the proof in the cause, to determine, whether according to the ordinary extent and usual course of the cattle trade on Sunday over the defendant's road from Baltimore, and the notice given the defendant's agents of the approach of trains for transportation on Sunday, the 28th of July, the defendant had made reasonable provision, and exerted due care and diligence to guard against delay in forwarding the cattle trains that might be received from the B. and O. R. R. on that day; or whether upon the receipt of such notice as was given, the requisite means or equipment could have been provided, by reasonable exertion, to take forward the plaintiff's cattle, without the delay that actually occurred.

2d. That if the defendant provided reasonable equipment to meet the requirements of the Sunday's transportation in the usual course, upon the notice received, and the plaintiffs' cattle were carried forward and delivered with due diligence, and as much expedition as was practicable under the circumstances of the case, the defendant was not liable for the unavoidable delay; that is to say, a delay that could not have been avoided by the exercise of reasonable precaution and diligence.

3d. But on the other hand, if the delay could have been avoided by the use of due diligence, and the making of proper effort to send forward the cattle with ready and convenient despatch, and injury resulted from a failure in that respect, the defendant was liable therefor.

4th. That the duty to deliver safely, and the duty to deliver in due time, were distinct obligations. The time of delivery was often a matter of distinct contract; but when, as in this case, there was no express contract, there was an implied obligation to deliver within a reasonable time; and that meant a time within which the carrier could deliver, using all reasonable exertion, and taking all reasonable precaution to avoid delay.

5th. That as it was sought to charge the defendant with the consequences of the delay, and the failure to use such degree of diligence in forwarding the cattle as would have secured their arrival at Jersey City in time for the cattle market of Monday, the 29th of July, it was material and necessary

that it should be shown that the defendant had knowledge of or from the circumstances of the case and the course of the trade, it might have reasonably been inferred that the cattle were intended for the market of that day.

6th. That it ought to have been submitted to the jury to find whether the defendant had made proper exertions, and used due and reasonable diligence, under all the circumstances of the case to avoid all unnecessary delay in the transportation of the cattle; or whether the cattle could have been carried forward with greater expedition and despatch than they were, by the use of reasonable precaution and diligence on the part of the defendant, under the circumstances in reference to which it was called upon to act.

7th. That if the defendant had been guilty of such negligence in the transportation of the stock as to render it liable, it could not relieve itself by showing that a connecting road might have made up for its default.

8th. That the mere fact that the plaintiffs' agent had knowledge of what had been done, or what was being done in regard to the cattle, and their destination, could in no manner affect the defendant's liability for failure or neglect in the discharge of its duty as carrier.

APPEAL from the Circuit Court for Howard County.

The case is stated in the opinion of the Court.

Exception.—At the trial the plaintiffs offered the two following prayers:

1. If the jury find from the evidence that on the evening of the 28th of July, 1878, at a little before seven o'clock, thirteen car loads of cattle belonging to the plaintiffs were delivered by the Baltimore and Ohio R. R., on the tracks of the defendant, at Canton Ferry, to be carried over the defendant's road to Philadelphia, and thence by the Pennslyvania R. R. to Jersey City, for the market of Monday, July 29, 1878, and that defendant was not in the habit of running freight trains over its road on Sunday, but was in the habit of running trains on Sunday, especially for the purpose of transporting cattle from Baltimore, to be delivered in Jersey City in time for the market of Monday; and that said cars were taken by the defendant's engine and employees from said Ferry to Canton Yard, and were there allowed to remain standing on defendant's tracks for about five hours; and shall further find that the ordinary running time for stock trains from Baltimore to Jersey City, was from ten to twelve hours, and that in consequence of such delay at Canton Yard, said cattle did not reach Jersey City in time for the market of Monday, and that the plaintiffs thereby sustained loss, then the plaintiffs are entitled to recover.

2. If the jury find for the plaintiffs under their first prayer they may embrace in their verdict any loss which they may find to have been sustained by the plaintiffs from loss in weight, or shrinkage in the cattle, from decline in the market value between the time when they could have been sold, if they had been transported with due dispatch and the time when they were actually sold, and any expenses incurred by the plaintiffs in feeding the cattle during

such period for which they were held over by reason of any failure to transport them with due dispatch.

And the defendant offered the six prayers following:

1. That if the jury shall find that at the time of the injury complained of, the defendant advertised no freight trains for Sunday, and ran no regular freight trains on that day of the week, and that having regard to the day being Sunday, and the manner and time of the notification from the delivery by the Baltimore and Ohio R. R. Co., and the means of transportation in the defendant's power, when such notification was received, and the other circumstances of the case, the defendant used reasonable diligence in forwarding the plaintiff's stock, then the plaintiffs are not entitled to recover, and their verdict must be for the defendant.

2. That if the jury shall find from the evidence, that the defendant gave such notice to the agents of the Pennsylvania R. R. Co., of the intended delivery to it of plaintiff's stock, and delivered it to that company at such a time as to enable the Pennsylvania R. R. Co., by the use of reasonable diligence to deliver the same at Jersey City in time for Monday's market, then the plaintiffs are not entitled to recover, and their verdict must be for the defendant.

3. If the jury shall find that the intended delivery to defendant of plaintiffs' stock, was not notified to defendant at such a time and in such a manner, and that the same was not delivered to defendant at such a time and in such a manner, as to enable defendant by the exercise of reasonable diligence to forward the same to the Pennsylvania R. R. Co., in time for that company by the exercise of reasonable diligence to deliver the same in Jersey City, in time for Monday's market (and that the defendant did not receive the cattle for that purpose), then the plaintiffs are not entitled to recover, and their verdict must be for the defendant.

4. If the jury shall find from the evidence, that at the time of the injury complained of, the defendant advertised no freight trains to run on Sunday, and ran no regular freight trains on that day of the week, and that stock from the west transported over the Baltimore and Ohio R. R. was received by defendant on Sunday, for transportation over its road, in pursuance of an understanding and agreement between defendant and said Baltimore and Ohio R. R. that such stock would be transported over its line on Sunday, upon the defendant's receiving reasonable and proper notice of the arrival of such stock for transportation over defendant's road; and if the jury further find, that the stock mentioned in the declaration, did arrive in Baltimore City on Sunday, July 28, 1878, and was delivered by the Baltimore and Ohio R. R. Co., to defendant, for transportation over its road, and that the notice to the defendant of the arrival of the stock was not, under all the facts and circumstances of the case, reasonable and proper to enable the defendant

to transport the same over its road, so that the same could be delivered to the Pennsylvania R. R. Co., for transportation, in time to reach the New York market the succeeding day, and that upon notice to the defendant of the arrival of said stock, the defendant used all reasonable and proper diligence for the transportation of the same over its road, and delivered the same with reasonable and proper diligence to the Pennsylvania R. R. Co., for transportation to their point of destination, then the plaintiffs are not entitled to recover.

5. That if the jury shall find from the evidence, that the plaintiffs' cattle were shipped from the West for Jersey City, to be transported over the line of defendant's road, and those of other companies, then the defendant is only liable for delays occurring on its own road, and if the jury shall find that defendant, on receiving the same, used, under all the circumstances of the case, reasonable diligence in forwarding it and delivering it to the next road, that of the Pennsylvania R. R. Co., then the plaintiffs are not entitled to recover (unless the jury find for the plaintiffs under the first prayer).

6. That if the jury shall find that the defendant ran no regular freight trains on Sunday, and advertised no freight trains on that day, and the stock in question mentioned in the declaration did arrive in Baltimore on Sunday, July 28, 1878, and was delivered by the Baltimore and Ohio R. R. Co. to defendant for transportation over its road, and that the notice to the defendant of the arrival of said stock was not, under all the facts and circumstances of the case, reasonable and proper to enable the defendant to transport the same over its road, so that the same could be delivered to the Pennsylvania R. R. Co., for transportation in time to reach the New York market the succeeding day, and that upon notice to the defendant of the arrival of said stock, the defendant used all reasonable and proper diligence for the transportation of the same over its road, and delivered the same with reasonable and proper diligence to the Pennsylvania R. R. Co., for transportation to their point of destination, and that said stock was in charge of Richard Harrold, the shipper on part of plaintiffs, and representing the plaintiffs, and that the defendant received said stock, and transported the same over its road, with the knowledge and consent and acquiescence of said Harrold, representing the plaintiffs; and further find, that the said Harrold knew the delay of said stock at Canton, and knew that said stock was intended for the New York market on Monday, then the plaintiffs are not entitled to recover.

The Court (HAYDEN, J.) granted the prayers of the plaintiffs, and rejected the first, second, fourth and sixth prayers of the defendant, and modified its third and fifth prayers, by adding the words contained in brackets, and granted them as thus modified.

The defendant excepted, and the verdict and judgment being rendered against it, appealed.

The cause was argued before BARTOL, C. J., BOWIE, ALVEY and IRVING, J.

John J. Donaldson and Henry E. Wootton, for appellant.

The declaration charges the defendant with negligence in its calling as a common carrier on a Sunday. The defendant could be under no common law duty as common carrier, to carry on Sunday. Art. 30, sec. 178, of the Code; Walsh *v.* R. R. Co., 42 Wis. 23; Johnston *v.* Commw., 22 Pa. St. 102; Powhatan St. Co. *v.* Appomatox R. R., 24 How. 255–7; Merritt *v.* Earle, 29 N. Y. 120.

It could only be bound by special contract to carry on that day; and the declaration is defective, in that no such special contract is alleged, or averments made from which the same could be inferred.

The declaration charges defendant as a common carrier, yet makes the gist of the cause of action to lie in a failure to deliver at a given time. In the absence of a special contract for delivery at a given time, common carriers are not bound to such a delivery. Story on Bailments, sec. 545a; 2 Redfield on Railways, 192, and notes; Taylor *v.* Gt. N. Ry., 12 Jur. N. S. 372; Broadwell *v.* Butler, 6 McL. 296; Conger *v.* Hudson R. R., 6 Duer, 375; Wibert *v.* N. Y. and E. R. R., 19 Barb., 36, and 2 Kern. 245; Peet *v.* Chicago and N. W. R. R., 20 Wis. 594; Hurst *v.* Gt. W. Ry. Co., 19 C. B. N. S. 310; Hales *v.* Lond. and N. W. Ry., 4 B. and S. 66; Taylor *v.* Gt. N. Ry., 1 L. R. C. P. 385; Parsons *v.* Hardy, 14 Wend. 215.

It is not even stated that the defendant knew the cattle were intended for Monday's market, for the failure to reach which damages are claimed. Such knowledge is necessary to the carriers' liability for failure to fulfil the purpose. Horne *v.* Midland Ry., 8 L. R. C. P. 131.

Art. 30, sec. 178, of the Code of Public General Laws forbids all labor, etc. ("works of necessity and charity always excepted"). Then, whether the Sunday carriage of plaintiffs' cattle was or was not in fact such a work of charity or necessity, the declaration is fatally defective, in that it does not bring the cause of action within the exception, either in terms or by averment of facts that would make it applicable. 1 Chitty's Pl. 233; Pate *v.* Wright, 30 Ind. 476: Jones *v.* Andover, 10 Allen, 21; Kent *v.* Holliday, 17 Md. 387; Bode *v.* State, 7 Gill, 326.

The rule of diligence by which carriers are bound, is to deliver goods within a reasonable time, having regard to all the facts and circumstances of the case. Story on Bailments, sec. 545a; 2 Redfield on Railways, 192, and notes.

And what is a reasonable time is a question of fact for the jury

to decide, depending upon such circumstances. Nettles *v.* T. C. Ry., 7 Rich. 190, 409; Conger *v.* Hudson R. R. R., 6 Duer, 375; Mich., etc., R. R. Co. *v.* McDonogh, 21 Mich. 165.

The plaintiffs' first prayer is, therefore, fatally defective. Not only does it decide, as matter of law, that, if the jury find the facts enumerated, the defendant did not use due diligence, but it entirely omits some of the most material facts given in evidence, for example: that all the crews for the running of trains, are (with the exception of one sent off before notification of the coming of plaintiffs' stock) in Philadelphia; that the invariable course was for the Baltimore and Ohio R. R. Co. to give notice of the cattle for next day's transportation; that that company had, on the 27th, notified defendant that it would have twenty to thirty cars, while, in fact, there came and were sent off on the 28th, before President Street was notified of plaintiffs' thirteen cars, thirty-nine cars of stock; that the Baltimore and Ohio R. R. Co. knew at 9.19 A. M. of the 28th, of the expected arrival of plaintiffs' cattle, and though defendant's operator was in his office till 11 A. M., that company never notified him, etc., etc.

The prayer, then, is obnoxious as presenting to the jury a number of facts segregated from the rest of the facts proved in the case, and some of those precisely the most important. Riggin *v.* Patapsco Ins. Co., 7 H. & J. 291; Beall's Lessee *v.* Beall, 7 Gill, 237; Beall *v.* Pearre, 12 Md. 550, 568; Fulton *v.* McCracken, 18 Md. 528; Cook *v.* Carr and Wife, 20 Md. 403; Folk and Smith *v.* Wilson, 21 Md. 538; Connor and Gatch *v.* The Mt. Vernon Co. 25 Md. 55; Thomas *v.* Sternheimer, 29 Md. 268; Winner *v.* Penniman, 35 Md. 163; Stansbury *v.* Fogle, 37 Md. 387; McWilliams *v.* Hoban, 42 Md. 63.

This prayer also assumes a duty on the part of defendant to deliver the cattle so as to reach Jersey City at a given time. Such a duty can only arise on a special contract so to do. The prayer is misleading, if it intended to leave to the jury the question whether there was such a contract, as it is nowhere clearly put to them. If it meant to state a common law duty, it is bad.

Further, if founded on a supposed common law duty, the prayer is bad as not leaving it to the jury to find the facts that would make defendant a common carrier on that day of the week, e. g.: that defendant held itself out as ready to carry for every one. B. and O. R. R. *v.* Green, 25 Md. 72; Ingate *v.* Christie, 3 C. & K. 61; Johnson *v.* Ry. Co., 4 Exch. 367.

Nor is the prayer good if grounded on a supposed special contract, for it leaves out the most material facts from which it might be attempted to infer such a contract. For such a purpose all the accompanying circumstances must be put to the jury. B. and O. R. R. *v.* Green, 25 Md. 72.

But there is no evidence from which such a special contract could be inferred.

But, even if founded on a supposed common law liability to deliver at a given time for a given purpose, such liability could only arise where there was a knowledge of that purpose. Horne *v.* Midland Ry., 8 L. R. C. P. 131; Same Case, 28 L. T. N. S. 312; 7 L. R. C. P. 264; and this is not clearly put to the jury in the plaintiffs' prayer.

The prayer, however, does not leave the scienter to the jury. If it was meant to do so, it is in such a form as to be utterly misleading to them. But granting that the scienter is clearly put to the jury, the mere knowledge would not raise a special contract to deliver at a given time, and would not vary defendant's responsibility as to the time of delivery; the gist of the matter being whether defendant exercised reasonable dispatch in the transportation over its line. Fitzgerald *v.* Midland Ry., 34 L. T. N. S. 771. The shipper is presumed to know the usages and general course of business prevailing between the successive carriers as to notice of arrival of goods and delivery for further carriage, and is bound by them. Wood *v.* Milwaukee and St. Paul R. R., 27 Wis. 541; U. S. Tel. Co. *v.* Gildersleeve, 29 Md. 232.

With this prayer falls the Court's modification of the defendant's fifth prayer. Moreover, the carrier is only bound to the extent of his profession. Johnson *v.* Ry. Co., 4 Exch. 367.

The defendant's first prayer clearly and distinctly leaves it to the jury to say whether or not, under such circumstances, the defendant used reasonable diligence, the only question arising in case of alleged delays by carriers.

And the same question is put to the jury in the defendant's third, fourth and fifth prayers.

As to the question of how far the defendant's liability is affected by negligence of a third party; if such negligence is material to the case, the defendant's first prayer is defective, as it entirely ignores it, though the record is full of evidence on that head. If such negligence were not material, the evidence would have been irrelevant and inadmissible. But no objection was taken to it at the trial below.

The defendant's second prayer presents the question of negligence on the part of the Pennsylvania R. R. Co., without which the loss would not have occurred.

There was evidence on which the jury could find that the Pennsylvania R. R. Co. did not use reasonable diligence. Though notified between 9 and 10 P. M. of Sunday evening, it did not take the cattle away till forty-six minutes after delivery on its tracks, and took nine hours to run eighty-nine miles, when the defendant had run ninety-six in less than five hours.

If that company did not use reasonable diligence, and by doing

so, could have got the cattle to Monday's market, which closed at 11.30 A. M. to 1 P. M., the defendant is discharged. Its only obligation is to use reasonable diligence to deliver to the next succeeding carrier in such time as to enable it, by the same diligence, to deliver in time at the destination. B. and O. R. R. v. Green, 25 Md. 72; Harper's Case, 29 Md. 330; Schumacher's Case, 29 Md. 168.

If this could have been done by a delivery to the Pennsylvania R. R. at 5.10 A. M., it is utterly immaterial how much earlier defendant might have delivered them. There is nothing to show that that company would have been more likely to get them on in time had they been received by it six hours earlier, and the delay on that line, and not on defendant's, is the sine qua non of the loss, if any.

There has been an endless discussion of the theory of remote and proximate cause in cases of negligence, but all the authorities are agreed, that, no matter how many concurring negligences there may be, no party, however negligent, is liable, unless his negligence be a sine qua non of the injury. Trainor's Case, 33 Md. 542; Bigelow's L. C. on Torts, 610, and cases cited; Carter v. Towne, 103 Mass. 507; Ins. Co. v. Tweed, 7 Wall. 44, 52; Ann. and E. R. R. R. Co. v. Gantt, 39 Md. 143; U. S. Tel. Co. v. Gildersleeve, 29 Md. 232.

The Baltimore and Ohio R. R. Co. had notice of the expected arrival in Baltimore of plaintiff's cattle—first at 9.19 A. M., and again at 2.37 P. M. of Sunday, July 28th, and that they were to go through to Jersey City. Yet they did not notify President Street till 5.20 P. M., when the only crews the defendant had had been sent off with the other cattle.

The Court modified the defendant's third prayer, which was specially directed to these facts, by inserting the words, "and that the defendant did not receive them for that purpose" (viz., for delivery at Jersey City in time for Monday's market), and granted it with this modification. The effect of this is to throw on the defendant the duty of delivery at a given time at Jersey City, a point beyond its own line, and the further terminus of the Pennsylvania R. R., without regard to the manner or time of the delivery to defendant, or any notification (as was usual,) beforehand, on a day when it advertises and runs no regular freight trains.

Moreover, it leaves the defendant directly responsible for losses by delays, etc., on another line, that of the Pennsylvania R. R. Co. By the Maryland decisions the defendant cannot be liable beyond its own line, unless by special contract to that effect. B. and O. R. R. Co. v. Green, 25 Md. 72; P. W. and B. R. R. Co. v. Harper, 29 Md. 330; B. and O. R. R. v. Schumacher, 29 Md. 168; R. R. Co. v. Pratt, 22 Wall. 123; Pratt v. Ry. Co., 95 U. S. 43.

Under this head also, the plaintiffs' first prayer is bad. It di-

rects the jury to find for the plaintiffs if the cattle of the plaintiffs were delayed five hours at Canton, and in consequence did not reach market in time, but does not qualify this general statement by going on to say, "unless the jury shall find that such delay was in consequence of the default of the Baltimore and Ohio R. R. Co. (late delivery, failure to notify, etc., etc."). If the defendant's delay was caused by such default of a third party, it is discharged. Conger *v.* Hudson R. R. Ry., 6 Duer, 275. Especially if that third party was the carrier selected by plaintiffs to deliver to defendant. Thorogood *v.* Bryan, 8 C. B. 115.

The plaintiff's agent, Richard Harrold, was with the cattle from the time they left Ohio until they reached Jersey City. The contention of the plaintiffs seems founded in one aspect on the theory that the mere receipt by the defendant raised the duty to deliver at Jersey City, at a given time at all events, but the plaintiffs, by their representative, Harrold, were fully aware of the route and the running time, and the impossibility, if there was such, of the defendant's doing so, and the circumstances from which it arose, and assented to the receipt by the defendant under those circumstances. The plaintiffs' first prayer is defective, in that while attempting to raise such a liability from the receipt, it leaves out the fact of Harrold's presence and knowledge of all the circumstances attending the receipt. The carrier is only bound to the extent of his profession. Johnson *v.* Ry. Co., 4 Exch. 367. And on the theory of special contract, such omission is equally fatal to prayer.

William A. Fisher, for the appellees.

The demurrer of the defendant was properly overruled. The time is so alleged in the narr., that it need not be proved as laid—hence the demurrer does not raise the question.

The carriage of the cattle, under the circumstances, was not forbidden by the statute against labor on Sunday. The cattle had come to Baltimore from a long distance, during the heat of the dog days, closely confined in uncomfortable cars. There were no arrangements for their comfort, if they were detained in transit. The loss also to the owner must be great from delay. To carry them on with the utmost despatch was, therefore, not merely "a work of charity," but also "of necessity." It will scarcely be contended in this day of enlightenment, when the helpless among the brute creation, as well as among human kind, are protected by statutes against cruelty, that "charity" is not a mantle broad enough to embrace within its folds any of God's creatures. The Congress of the United States has practically recognized the demands of "charity" in such cases, in regulating by law the manner of transporting cattle, and by rendering it unlawful to confine them in cars beyond the time fixed by the Act. Com'rs *v.* Knox, 6 Mass. 77; Pearce *v.* Atwood, 13 Mass. 351; Com'rs *v.* Sampson, 97 Mass. 407; Flagg *v.* Milbury, 4 Cush. 244.

But if it were conceded that the reception of the cattle by the defendant was an unlawful act, the appellees would not be precluded from recovery. They had placed their cattle in charge of the Baltimore and Ohio R. R. at Parkersburg, on Saturday, for transportation to Jersey City. The plaintiffs resided in Baltimore. If it was unlawful for the defendant to receive and transport the cattle on Sunday, the defendant was bound to decline to receive them from the Baltimore and Ohio R. R. Co. This would have left them in charge of the Baltimore and Ohio R. R. Co., which could at least have notified the appellees, and given to them the opportunity to remove the cattle from the cars, and to take care of them for further transportation, or for sale in the Baltimore market. The appellant having received them, even if it violated the law in doing so, nevertheless then became bound to perform at once all the duties of a common carrier, with reference to them. P. W. and B. R. R. Co. *v.* Phila. and Havre de Grace S. Co., 23 Howard, 217–18; Powhatan Steamboat Co. *v.* Appomattox R. R. Co., 24 Howard, 255–7; Merritt *v.* Earle, opinion of WRIGHT, J., 29 N. Y. 120; Jones *v.* Norwich Co., 50 Barb. 207; Sanders *v.* Staten Island R. R. Co., 13 Abbott's Pr. Rep. N. S. 352–5; Hall *v.* Corcoran, 107 Mass. 251; Carroll *v.* Carroll, 65 Barb. 32, and 58 N. Y. 133–7; Sutton *v.* Town of Wauwatosa, 29 Wisc. 21; S. C. Bigelow, L. C. Torts, 711.

The prayers granted at the instance of the appellees were free from objection. The measure of damages were properly stated. B. and O. R. R. Co. *v.* Brady, 32 Md. 335; Block *v.* Camden and Amboy R. R. Co., 45 Barb. 40; Smith *v.* N. H. R. R. Co., 12 Allen, 531.

All the prayers on the part of the appellant except the second are based upon the theory that if the Baltimore and Ohio R. R. Co. failed to give to the appellant notice that the cattle were about to arrive, as long before their arrival as it ought to have been given, under the terms of the arrangements between the two companies, the appellant was absolved from liability to the appellees for the delay which resulted, because the appellant had no crew in readiness to take the cattle forward after they had been received. This theory cannot be maintained. The appellant assumed all the responsibilities of a common carrier when it received the cattle. Brady's Case, 32 Md. 333.

The common carrier cannot excuse himself for delay by showing the lack of proper appliances for the transportation. Tucker *v.* Pacific R. R. Co., 50 Mo. 385; Ill. Cent. R. R. *v.* Waters, 41 Ill. 73.

The common carrier may refuse to receive the goods, if offered at an improper time, but if he receive them, he must be prepared to perform his common law duties with regard to them. Lane *v.*

Cotton, 1 Lord Raymond, 652; Angell on Carriers, secs. 125, 136a, note a.

ALVEY, J., delivered the opinion of the Court.

The first question that presents itself on this record is that raised by demurrer to the plaintiff's declaration. The declaration alleges that the defendant is a common carrier for hire; that on the 28th of July, 1878, about the hour of 4 o'clock, P. M., the defendant received from the Baltimore and Ohio R. R. Co. thirteen cars loaded with cattle, belonging to the plaintiffs, to be transported by the defendant, for a reward for that purpose paid or to be paid by the plaintiffs to the defendant, with reasonable despatch over the road of the defendant; but the defendant did not, nor would, transport the same with reasonable despatch, but detained the same upon its road, in the City of Baltimore, from the time of the delivery to the defendant until about half past 12 o'clock A. M. of the morning of Monday, July 29th, 1878. By reason whereof the said cars, so laden with cattle, failed to reach Jersey City stock-yards, their point of destination, until the hour of 3 o'clock P. M. of the day last mentioned, and too late for the market of that day; and the plaintiffs were compelled to retain the cattle until the market of Wednesday following, whereby a large shrinkage took place in the weight of the cattle, and deterioration of their condition, and the plaintiffs were put to great expense, in feeding the cattle during the period of delay, and loss of time thereby, and suffered loss by reason of the decline in the market value of the cattle, etc.

The Court below overruled the demurrer, and required the defendant to plead, and the question is, whether that ruling was correct.

As the defendant is charged with failure of duty, in the exercise of its calling as a common carrier for hire, the question raised by the demurrer is, whether on a Sunday there was, in the absence of a special contract, a common law duty imposed upon it, unrestricted and unaffected by statute, to carry or forward the cattle of the plaintiffs on that day, under the facts alleged in the declaration.

The declaration does not allege in terms that the cattle were delivered to the defendant for transportation on Sunday, but it alleges that the defendant received of the Baltimore and Ohio R. R. Co., a connecting road, the cattle on the 28th of July, 1878, to be transported with reasonable despatch over its road. It is the duty of the Court to notice the days of the week on which particular days of the month fall; and hence we know, without other averment, that the 28th of July, 1878, was Sunday. Hoyle *v.* Cornwallis, 1 Strange, 387; Kilgour *v.* Miles, 6 G. and J. 268. And in the regular division of time, Sunday embraces all of the twenty-four hours next ensuing the midnight of Saturday.

Supposing the defendant to have professed and held itself out as a common carrier of live stock on Sunday as on other days of

the week, whether it would have been bound to accept for carriage from the plaintiffs, or from a connecting road, stock offered on a Sunday, is a question not necessary to be decided. It is alleged that the plaintiff's stock was offered on Sunday and actually received by the defendant to be transported over its road, with reasonable despatch. The action is founded upon the common law duty and liability of the defendant as a common carrier of live stock, and not upon any special contract either as between the plaintiffs and defendant, or as between the defendant and other connecting roads. It is alleged that the defendant detained the stock on its road at Baltimore for a period of about seven or eight hours, after receiving it to be transported, whereby loss and injury accrued to the plaintiffs; and the question is, whether the defendant was justified in the detention by the fact that the stock was received upon the road on Sunday, about 4 o'clock P. M.

Most, if not all, of the States of the Union have what are familiarly known as Sunday laws; and while they may differ in their phraseology and the penalties imposed, they are substantially the same in their general scope and provision;—all looking to keeping the day sacred, and as one of rest from secular employments. Of these laws there has been great diversity of interpretation. Some courts holding to them with great strictness, while others have construed them with considerable liberality,—and especially in cases where, by strict construction, impediments and embarrassments would be raised to the great carrying business of the country. In this court we have had no case analogous to the present; but, looking to what has been decided elsewhere, we have no doubt in concluding that our Sunday law as found in the Code, Art. 30, sec. 178, has no application to this case whatever. That statute forbids all persons to "work or to do any bodily labor on the Lord's day, commonly called Sunday;" and it provides that no person shall command or willingly suffer any of his servants to do any manner of work or labor on that day—works of necessity and charity always excepted;—and a small penalty is prescribed for a breach of the statute.

According to the principles of the common law, applicable to common carriers, the defendant having accepted the stock to be transported over its road, in the usual course of transit, it at once became its duty to forward the same without unnecessary delay or detention. Its obligation was to carry according to its public profession, and the conveniences at its command. Johnson *v.* Midland R. Co., 4 Exch. 367. And if injury be sustained, by reason of any neglect of this duty, or other wrongful act, in the carrying and delivery of the cattle, the fact of their having been received to be carried, or having been carried, on Sunday, can afford no excuse to the defendant, or exoneration from liability. The carrying forward of the cattle by the defendant on Sunday was not illegal;

it was fairly and justly a work of necessity, and therefore excepted from the operation of the statute. And that being the case, there is no ground for the excuse relied on by the defendant. Powhatan Steamboat Co. *v.* R. R. Co., 24 How. 247, 253; Carroll *v.* Staten Island R. Co., 58 N. Y. 126; Flagg *v.* Millbury, 4 Cush. 243. And even upon the supposition that the plaintiffs were violating the law in having their cattle transported on a Sunday, it is well settled that the defendant could not avail itself of such infraction of the law by the plaintiffs, as a defence to an action for the consequences of a wrong or negligence of its own. Phil., Wilm. and Balto. R. Co. *v.* Steam Towboat Co., 23 How. 209; Mohoney *v.* Cook, 26 Penn. St. 342; Sutton *v.* Town of Wauwatosa, 29 Wis. 21; Carroll *v.* Staten Island R. Co., 58 N. Y. 126. The court below was clearly right, therefore, in overruling the demurrer of the defendant to the declaration of the plaintiffs.

And having disposed of the question raised upon the demurrer to the declaration, we come now to consider the questions raised upon the facts of the case as proved upon the trial, under the plea of the general issue, not guilty.

The defendant owned and operated a line of railroad between Baltimore and Philadelphia, connecting at Canton, a mile and a quarter out of Baltimore, by ferry, with the Baltimore and Ohio R. R., at Locust Point, and at Gray's Ferry, near Philadelphia, with the Pennsylvania R. R. Its principal offices, and the home of its rolling stock, were and are still in Philadelphia, and the men for running its trains come from that point; and all orders for running trains issue from the same place. The defendant ran no regular freight trains on Sunday during the summer of 1878, and none were on the schedules or otherwise advertised for that day of the week. But special trains were run on Sunday for the accommodation of the cattle trade, by an arrangement with the Baltimore and Ohio R. R. Co., which had been in existence for some time previous. And, according to the testimony of witnesses, the usual and regular course of dealing, as between the two companies, was for the Baltimore and Ohio R. R. Co. to give notice by telegraph, on Saturday, and again on Sunday morning, of what cattle there would be for transportation over the defendant's road during the day of Sunday. Such notice was given, as stated by the witness, to the defendants agents at Canton, that they might be ready to receive the cattle, and also to the defendant's agents at the President Street depot, in the city, that they might hold over the necessary crews, and have them and the engines in readiness to take forward the trains; that, upon the arrival of the cattle trains at Canton from Locust Point, the defendant's agent at the President Street depot, upon notice, would send down the crews and engines to take on the trains.

With this arrangement existing, the plaintiffs, on Saturday, the

27th of July, 1878, started from the Ohio River, at Parkersburg, West Virginia, thirteen car loads of cattle, over the Baltimore and Ohio R. R., destined for Jersey City. The train was regularly due in Baltimore at 12 o'clock, M. of Sunday, the 28th of July. It did not, however, arrive on time. It reached Mount Clare, Baltimore, a little before 5 o'clock of that afternoon; and it left that station for Locust Point about 5.35 P. M.; and all the cars did not reach the tracks of the defendant's road at Canton before 7 o'clock P.M. The distance from Baltimore to Gray's Ferry, by the defendant's road, is ninety-six miles; and from the latter point to Jersey City, by the Pennsylvania R. R., the distance is eighty-nine miles; and the time usually taken for the running of cattle trains from Baltimore to Jersey City is from ten to twelve hours.

It is shown in proof, by the testimony of witnesses, and the production of telegrams, that on Saturday, July 27th, at 12.45 P. M., the agents of the Baltimore and Ohio R. R. Co., at Mount Clare, notified, by telegraph, the agents of the defendant, at the home office in Philadelphia, at the President Street depot, in Baltimore, and at Canton station, that there would be, on the following day, from twenty to thirty cars of stock to go through to Philadelphia and New York; and that they would leave Mount Clare station, at about 3½ o'clock P. M. On Sunday, the 28th, several despatches were sent from the office of the Baltimore and Ohio R. R. Co. to the agents of the defendant, announcing stock to be forwarded to Philadelphia and Jersey City, and all of which despatches were duly received by the agents of the defendant. The first of these appears to have been sent at 3.40 P. M., giving notice of fifteen cars by numbers and consignments. The next to the defendant's agent at Canton, at 3.45 P. M., and to the agent at the President Street depot, at 5.10 P. M. Another was sent at 4.55 P. M. to the agents at Philadelphia, Baltimore and Canton, giving notice of twenty-four cars, by numbers and consignments; and another was sent to same agents at 5.20 P. M., this last giving notice of thirteen cars, by numbers and consignments, and having special reference to the plaintiffs' stock. By the despatch that was sent to the defendant's agent at Canton at 3.45 P. M, and to the agent at the President Street depot at 5.10 P. M., those agents were informed that fifteen cars of stock were still out; that they were expected by 3½ o'clock P. M.; that they were to go to New York; and the agents were requested to "arrange to run them through without delay." The fifteen car loads here referred to included the thirteen belonging to the plaintiffs.

Upon the notification thus given, the defendant had in reserve at Baltimore but two engines and two sets of hands to take forward the cattle trains that arrived during the afternoon of Sunday, the 28th of July. Of the cars that arrived between 3 and 4 o'clock of that afternoon, two trains were made up, and were sent

forward about 5 o'clock that evening; the engine for the first train leaving President Street depot at 4.35 P.M., and that for the second at 4.51 P.M., the whole number of cars in the two trains being thirty-nine—nine more than were given notice of by the despatch of Saturday. The cars with the plaintiffs' cattle, having been received on the defendant's road about 7 o'clock P.M., were not taken forward until fifteen minutes after 12 o'clock that night. They were delivered on the tracks of the Pennsylvania R. R., at Gray's Ferry, on the morning of July 29th, at about 5.10 A.M., and they were moved forward on the last-mentioned road a few minutes before 6 o'clock of that morning. The cattle, however, did not arrive at Jersey City until about 2½ or 3 o'clock P.M. of that day, and too late for that day's market. The next market day was Wednesday, when the cattle were sold.

In the absence of an express contract, the common law duty and liability of a common carrier for the safe carriage and due delivery of live animals are the same as that for the carriage and delivery of other property; the liability in all cases being qualified by the nature and inherent tendencies of the thing carried. In undertaking the carriage of live stock, therefore, the carrier assumes the obligation to deliver safely, and within a reasonable time, having due respect to the circumstances of the case. Balto. and Ohio R. R. Co. *v.* Brady, 32 Md. 333; Smith *v.* Ry. Co., 12 Allen, 531; Mynard *v.* Syracuse R. Co., 71 N. Y., 180. The same principle, though not necessarily involved, nor expressly decided, was recognized in the case of Bankard *v.* Balt. and Ohio R. R. Co., 34 Md. 197.

In this case there can be, of course, no liability on the part of the defendant for any delay in the transportation of the cattle before they reached the tracks of, and were received by, the defendant; nor is the defendant liable for any delay in carrying forward the cattle after they were delivered on the tracks of the Pennsylvania R. R. Co., at Gray's Ferry. In the case of an intermediate carrier, as the defendant in this case, that accepts property for carriage, directed to a place beyond the terminus of its route, the law, in the absence of a special contract, or of special circumstances, implies an undertaking on the part of the carrier to deliver the property carried, at the end of its route, to the next succeeding carrier; and for any failure in this duty, within a reasonable time, the carrier is liable to all the consequences of such failure. R. R. Co. *v.* Manf. Co., 16 Wall. 318; R. R. Co. *v.* Pratt, 22 Wall. 123; Pratt *v.* Ry. Co., 95 U. S. 43; Rawson *v.* Holland, 59 N. Y. 611; Phil., Wilm. and Balt. R. Co. *v.* Harper, 29 Md. 330. The principal question here is, whether, according to the ordinary extent and usual course of the cattle trade on Sunday, over the defendant's road from Baltimore, and the notice given the defendant's agents of the approach of trains for transportation on

Sunday, the 28th of July, the defendant had made reasonable provision, and exerted due care and diligence, to guard against delay in forwarding the cattle trains that might be received from the Baltimore and Ohio R. R. on that day; or whether, upon the receipt of such notice as was given, the requisite means or equipment could have been provided, by reasonable exertion, to take forward the plaintiffs' cattle without the delay that actually occurred? And this is a question that should have been submitted to the jury for their determination, upon all the proof in the cause. If the defendant provided reasonable equipment to meet the requirement of the Sunday's transportation in the usual course, upon the notice received, and the plaintiffs' cattle were carried forward and delivered with due diligence and as much expedition as it was practicable, under the circumstances of the case, the defendant is not liable for the consequences of the unavoidable delay; that is to say, a delay that could not have been avoided by the exercise of reasonable precaution and diligence. But, on the other hand, if the delay could have been avoided by the use of due diligence and the making of proper effort to send forward the cattle with ready and convenient despatch, and injury resulted from a failure in that respect, the defendant is liable therefor. The duty to deliver safely and the duty to deliver in due time are distinct obligations. The time of delivery is often a matter of express contract; but when, as in this case, there is no express contract, there is an implied obligation to deliver within a reasonable time, and that means the time within which the carrier can deliver, using all reasonable exertion and taking all reasonable precaution, to avoid delay. That proposition would appear to be well settled upon undoubted authority. Parsons *v.* Hardy, 14 Wend. 215; Taylor *v.* G. N. Ry. Co., L. R., 1 C. P. 385; Sto. on Bailm., sec. 545a; 1 Pars. on Contr. (4th ed.), 659, and cases there cited. And in determining the question of the liability of the defendant on the facts of this case, that principle is important to be observed.

With respect to the question of damages and the extent thereof to which the plaintiffs may be entitled to recover, it is only necessary to say a few words, in view of the authorities upon the subject. As it is sought to charge the defendant with the consequences of the delay, and the failure to use such degree of diligence in forwarding the cattle as would have secured their arrival at Jersey City in time for the cattle market of Monday, the 29th of July, it is material and necessary that it should be shown that the defendant had knowledge, or from the circumstances of the case and the course of the trade it might have reasonably inferred, that the cattle were intended for the market of that day. The defendant, at least, should have had an opportunity of contemplating the special consequences of a breach of duty, or of making some special provision against incurring the liability therefor; and with-

out notice this could not well have been done. Hadley *v.* Baxendale, 9 Exch. 341; Great West. Ry. Co. *v.* Redmayne, L. R., 1 C. P. 329; Horne *v.* Midland Ry. Co., L. R., 8 C. P. 131; Grindle *v.* Eastern Exp. Co., 67 Me. 317.

With these principles in view, we may now dispose of the several prayers ruled upon by the court below, and which were the subjects of exception by the defendant.

The first prayer on the part of the plaintiffs, and which was granted, we think erroneous. By that prayer it was not submitted to the jury to find whether the defendant had made proper exertions, and used due and reasonable diligence, under all the circumstances of the case, to avoid unnecessary delay in the transportation of the cattle; or whether the cattle could have been carried forward with greater expedition and despatch than they were, by the use of reasonable precaution and diligence on the part of the defendant, under the circumstances in reference to which it was called upon to act. The prayer assumes it as a principle that, the defendant having accepted the property for carriage for a particular market, the delay of five hours more than the usual time could not be excused, and that the defendant was bound to carry and deliver within a certain time, without reference to causes and contingencies referred to in the evidence, and whether they were reasonably within the defendant's control or not. This, as we have shown, is not the law, in the absence of an express contract requiring such delivery. That prayer, therefore, should have been refused.

The plaintiffs' second prayer, which was also granted, has not been seriously questioned in this court. It appears to be substantially correct, when construed in reference to the facts required to be found by the first prayer, and other undisputed facts in the case; and we shall therefore say nothing more in regard to it.

The first prayer on the part of the defendant, which was rejected, we think should have been granted. It was not as full and as explicit, perhaps, as it might have been made; but it would seem to embody all the elements of fact to make it a good defence to the action, if found by the jury.

The defendant's second prayer was properly refused. If the defendant had been guilty of such negligence in the transportation of the stock as to render it liable, it could not relieve itself by showing that a connecting road might have made up for its default. The duties and liabilities of the two roads were entirely distinct; and no recovery could be had against either, unless the injury complained of was caused by or resulted from the default of the particular party sued. The Pennsylvania R. R. Co. might well say that, if the cattle train had been delivered on its tracks at Gray's Ferry four or five hours sooner than it was, it would have reached Jersey City in ample time for the market of Monday, the

29th of July. The defendant's third prayer was also properly refused, because it made the defendant's liability, to some extent, to depend upon the exercise or non-exercise of such reasonable diligence as might have been within the power of the Pennsylvania R. R. Co. But we think the fourth and fifth prayers of the defendant, as offered, were unobjectionable, and should have been granted. The sixth prayer was properly refused. The mere fact that the plaintiffs' agent had knowledge of what had been done, or of what was being done, in regard to the cattle and their destination, could in no manner affect the defendant's liability for failure or neglect in the discharge of its duty as carrier.

It follows that the judgment below must be reversed, and a new trial ordered.

Judgment reversed, and new trial awarded.

See next case.

THEODORE P. BUCHER

v.

FITCHBURG R. R. Co.

(131 *Massachusetts Reports*, 156. *April* 9, 1881.)

The St. of 1877, c. 232, enacting that the provisions of the Gen. Sts. c. 84, § 2, "prohibiting travelling on the Lord's day, shall not constitute a defence to an action against a common carrier of passengers for any tort or injury suffered by a person so travelling," does not apply to an action brought after it went into effect for an injury received before its enactment.

In an action against a railroad company for personal injuries occasioned to the plaintiff while a passenger in one of its cars, it appeared that he was a travelling agent for an insurance company; that his sister, who was unwell and was temporarily residing in a distant State, had written to him that she had had a severe attack of illness and desired to be carried to her home; that he had written to her, stating his situation, that he was travelling, and asking her to arrange with a friend to bring her as far as a certain city, and that he would make arrangements for some one to accompany her from that place to her home, if her friend could not come with her any farther; that he expected an answer to his letter would reach B. in a week, which would decide whether he would have to go after her, or whether her friend would take her home; that, after writing this letter, he was absent from B. for about three weeks, travelling on his insurance business, but expected to reach there on the evening of a certain Saturday, for the purpose of getting his mail, procuring funds and attending to his business at the office of the insurance company; and that he missed a connection of trains, and, being desirous to reach B. in order that he might receive the expected reply from his sister, took passage on a freight train of the defendant on the following Sunday morning, and received the injuries complained of. *Held*, that there was no evidence which would justify the jury in finding that the plaintiff was travelling from necessity or charity, within the meaning of the Gen. Sts. c. 84, § 2.

TORT for personal injuries occasioned to the plaintiff, on Sunday, August 6, 1876, while a passenger in one of the defendant's cars. The answer set up that the plaintiff was travelling on the Lord's day in violation of law. At the trial in this court, before Ames, J., the jury returned a verdict for the plaintiff; and the defendant alleged exceptions. The facts appear in the opinion.

The case was argued in Nov., 1879, and re-argued in March, 1881.

E. D. Sohier & C. A. Welch, for the defendant.

A. A. Ranney, for the plaintiff.

ENDICOTT, J.—The first question in this case is whether the St. of 1877, c. 232, applies to actions brought after it went into effect, to recover damages from a common carrier of passengers for injuries received before its enactment. The statute is brief, and is in these words: "The provisions of section two of chapter eighty-four of the General Statutes, prohibiting travelling on the Lord's day, shall not constitute a defence to an action against a common carrier of passengers for any tort or injury suffered by a person so travelling." It took effect upon its passage, May 15, 1877. The alleged injury was received in August, 1876, and this action was brought in March, 1878.

It may be stated as a general rule applicable to the interpretation of a statute, that it shall have a prospective operation only, unless it is distinctly expressed in the statute, or clearly to be implied from its provisions that it is to have a retroactive effect. It was said by Chancellor Kent, that a statute is not to have any retrospective operation; and Mr. Justice Merrick, in commenting on this in Garfield *v.* Bemis, 2 Allen, 445, said: "This statement of the doctrine, however, is undoubtedly subject to some qualification. It is not strictly and rigidly applicable in all cases in respect to statutes of a remediable character. But it is always to prevail except where a different intent is distinctly indicated and provided for. And the general rule is laid down, as one not subject to any exception, that they are never to be allowed to have a retroactive operation, where it is not required either by the express command of the Legislature or by an unavoidable implication arising from the necessity of adopting such a construction in order to give plenary effect to their provisions." Gerry *v.* Stoneham, 1 Allen, 319; King *v.* Tirrell, 2 Gray, 331; Whitman *v.* Hapgood, 10 Mass. 437; Murray *v.* Gibson, 15 How. 421.

Though the language of this statute is sufficient to embrace cases arising as well before as after its passage, yet there is no express provision that it shall be retroactive, and there is no necessity for so construing it, as it will have full effect if confined to cases subsequently arising. In North Bridgewater Bank *v.* Copeland, 7 Allen, 139, the St. of 1863, c. 242, was under consideration, which provides that "usury between the payee and the maker of a promis-

sory note, payable on time, shall not be a defence to an action thereon, brought by the indorsee to whom the same was indorsed before maturity, for value and without notice, express or implied, of the usury;" and the court held that it did not apply to contracts which were in existence at the time of the enactment. The language of that statute in making a change in the existing law is substantially the same as the language of the St. of 1877, c. 232; and, having been passed upon by this court, it is not to be presumed that the Legislature intended to give any larger effect to the provisions of the St. of 1877. We are therefore of opinion that the St. of 1877 does not apply to this case, and that the defendant could properly set up that the plaintiff was travelling on the Lord's day.

The cases, in which it has been held that statutes regulating the rules of practice in the conduct of suits may apply to actions brought before as well as after their enactment, have no application to this case; they relate to forms of proceeding, and do not materially affect the rights of parties. Robbins *v.* Holman, 11 Cush. 26; George *v.* Reed, 101 Mass. 378, and cases cited. In the case at bar, this defence was a legitimate and proper one, under the law existing at the time of the alleged injury.

Nor can we hold, upon the facts reported, that there was any evidence which would warrant a jury in finding that the plaintiff was travelling on the 6th of August, which was the Lord's day, from necessity or charity, within the meaning of the Gen. Sts. c. 84, § 2. It appears from his reported testimony, that he was a travelling agent in New England for a fire insurance company; that his sister was unwell, and was temporarily residing in Minnesota; that on the second week of July she had written to him that she had had a severe attack of illness, and desired to be carried home to Philadelphia. And about July 15 he had written to her, stating his situation, that he was travelling, and asking her to arrange with a friend to bring her as far as Chicago, and that he would make arrangements for some one to accompany her from Chicago to Philadelphia, if her friend could not come with her any farther. To this letter he expected an answer to reach Boston in a week, that is, about July 21, which would decide whether he would have to go after her, or whether her friend would take her home. In his cross-examination, he stated, "When I wrote to my sister, it was to see what arrangement she could make to be brought home that might save me from leaving my field of labor." After writing this letter, he appears to have been absent from Boston, travelling on his insurance business, until Saturday, August 5. He had expected to arrive in Boston that evening, where he was going for his mails and to procure funds, and to attend to his business at the office of the general agent of his company. But he missed a connection of trains, and being desirous to reach Boston,

in order that he might receive the expected reply from his sister, he took passage on a freight train of the defendant on the following morning, which was Sunday, and received the injuries complained of. And it is contended that he was travelling from necessity or charity on that day.

The act of the plaintiff in thus travelling on the Lord's day was not an act of necessity within the meaning of the statute. Connolly *v.* Boston, 117 Mass. 64; Jones *v.* Andover, 10 Allen, 18; Commonwealth *v.* Sampson, 97 Mass. 407; Commonwealth *v.* Josselyn, 97 Mass. 411; McGrath *v.* Merwin, 112 Mass. 467; Smith *v.* Boston and Maine R. R., 120 Mass. 490; Davis *v.* Somerville, 128 Mass. 594.

It remains to be considered whether the travelling was an act of charity. In order to constitute an act of charity, such as is exempted from the Lord's day act, the act which is done must be itself a charitable act. The act of ascertaining whether a charity is needful is not the charity; but, so far as the statute is concerned, the only question in that case would be, Is this act a necessary act? That involves the question, whether the act is one which it is necessary to do on the Lord's day; and no previous neglect to obtain the requisite information on a previous day creates a necessity for obtaining it on the Lord's day. If it were held otherwise, a man having an important and necessary duty to perform might wilfully neglect to perform that duty through the whole week, and conclude to do it on Sunday, because it was an act necessary and proper to be done. In the case at bar, it is not sufficient that it was more convenient for the plaintiff to postpone his travelling to obtain the letter from his sister, in order that he might perform his private business. In McGrath *v.* Merwin, ubi supra, the plaintiff was repairing a wheel-pit on the Lord's day, and it was said in the opinion, "The only reason for doing the work on the Lord's day was, that the defendants were doing a large business, employing many hands, and 'the work done on the occasion would obviate the necessity of stopping the machinery in future.' The whole import of this is that it was more convenient and profitable to repair the wheel-pit on the Lord's day than it would be to do it on any secular day. This does not make it a work of necessity or charity within the exception of the statute." The same duty, of ascertaining whether an act of charity towards his sister was to be done, had been resting on the plaintiff for two weeks. It would be an extraordinary proposition that he could elect to do an act on Sunday which he could have done equally well on any previous secular day within that fortnight, and which he had postponed because he had considered it subordinate to his secular business. Suppose he had travelled the previous Sunday, in order the sooner to finish his business and reach Boston and obtain this letter, it could not be contended that travelling on the previous Sunday was

an act of charity. Or suppose he was under obligation to perform a contract, which it was his duty to complete before going on his charitable journey, and for that reason he performed secular labor all day Sunday, such labor would be neither necessary nor charitable within the meaning of the law.

It is apparent that the plaintiff's duty to his sister was made subservient to his secular business. We are therefore of opinion that the ruling should have been given, that there was no evidence which would justify the jury in finding that the plaintiff was travelling from necessity or charity, within the meaning of the statute.

Exceptions sustained.

See note to next case.

COMMONWEALTH

v.

LOUISVILLE AND NASHVILLE R. R. Co.

(*Advance Case, Kentucky.*)

The legislative will is supreme on all questions appertaining to the observance of the Sabbath as a day of rest, and an act passed by such body for that purpose must be held constitutional, unless it abridges the civil rights or privileges of the citizens of the State.

Where works of necessity are exempted from the operation of the statute, the law regards that as necessary which the common sense of the country, in its ordinary mode of doing business, regards as necessity.

A railroad company is engaged in a work of necessity when running its trains on the Sabbath to carry passengers, or live stock, or merchandise, if such work is necessary for the public service, and to enable it to discharge its duties and obligations to the public, and to comply with its contracts as a carrier for hire.

P. W. HARDIN, Attorney-General, for the Commonwealth.

PRYOR, J.—This action was instituted in the name of the commonwealth against the Louisville and Nashville R. R. Co. for an alleged violation of section ten, article seventeen, chapter twenty-nine of the General Statutes, which provides: "No work or business shall be done on the Sabbath day except the ordinary household offices, or other work of necessity or charity. If any person on the Sabbath day shall himself be found at his own or any other trade or calling, or shall employ his apprentices or other person in labor or other business, whether the same be for profit or amusement, unless such as is permitted above, he shall be fined not less than two nor more than fifty dollars for each offence. Every person or apprentice so employed shall be deemed a separate offence. Persons who are members of a religious society who observe as a

Sabbath any other day of the week than Sunday shall not be liable to the penalty prescribed in this section if they observe as a Sabbath one day in each seven, as herein provided."

Section two of title one of the Criminal Code provides: "A public offence, of which the only punishment is a fine, may be prosecuted by a penal action in the name of the commonwealth of Kentucky or in the name of an individual or corporation. If the whole fine be given to such individual or corporation, the proceedings in penal actions are regulated by the Code of Practice in civil actions."

Under these provisions of the Code these proceedings were had.

In the first paragraph of the petition it is alleged in substance that on the 3d day of April, in the year 1881, it being the Sabbath day, usually known as Sunday, the defendant (the railroad company) did run and operate over its railroad track in the County of Jefferson a certain train, consisting of one locomotive engine, baggage car and three general passenger coaches. Said train was at the time running and transporting for the profit of the defendant passengers and their baggage, merchandise, express packages and the United States mails into the State of Kentucky for sundry points within the State, and through said State into other States. That for the purpose of operating said train on the day aforesaid, the defendant did hire and employ certain persons to work and labor on the train as engineer, brakemen and baggage master, naming them, and for which labor they were paid their wages. It was further alleged that it was not a work of necessity or charity, and that those employed by the company, or either of them, did not observe as a Sabbath any other day in the week than Sunday.

The second paragraph relates to the running on the same day of cars transporting live stock, goods and merchandise destined for various points in Kentucky, Tennessee, etc., and by reason of these several violations of the statute the commonwealth claims that the railroad company became liable to pay fines amounting to $350: viz., one fine of $50 for running and operating the train, and six other fines of $50 each for the employment of the persons engaged in the work and labor on the same.

The defendant, in answer to the petition, states that the running and operating its trains was necessary on the day alleged for the public service, and to enable it to discharge its duties and obligations to the public, and to comply with its contract as a carrier for hire, engaged in transporting passengers and mails of the United States, and in carrying live stock, goods and merchandise from one point to another, in and out of the State. That the hire and employment of the laborers on its train was then and is now necessary for the safe and proper conduct of its business as a carrier. That the act in question, if applicable to the defendant, is in violation of the State and federal constitution. An issue was formed, and

the cause submitted to the court without the intervention of a jury. Several witnesses testified for the defence to the effect that it was absolutely necessary for railroad companies engaged in transporting passengers, freight and the mails in and out of the State to run their trains every day, including the Sabbath. That the public convenience and the necessities of trade requires that this should be done. That the delays to passengers in travelling from one section of the State to the other, or from the different sections of the country, if this was not done, would prove vexatious and expensive, and sometimes ruinous, and that the transportation of live-stock, fruits, ice, vegetables, fish, game, and, in many instances, merchandise, requires speedy and rapid delivery in order to preserve it and protect the rights of those interested in it.

The sole power of determining the policy of such an enactment as is brought in question is vested in the legislative department of the State government by the constitution, and unless the passage of this Sunday law, as it is usually termed, is inhibited by some provision of that instrument it must be sustained. The legislative will is supreme on all such questions, and, when not abridging the civil rights or privileges of the citizen, must be held to be constitutional. The constitutionality of similar enactments has been passed on and sustained by courts of last resort in nearly every State in the Union, and this concurrence of opinion, together with a deference to the former decisions of this court on kindred subjects, conclude in our opinion the constitutional questions raised, and we will discuss the application of the statute to the acts of this company alone, entertaining no doubt as to the constitutionality of the law.

The meaning to be attached to the words "or other work of necessity" found in the act must control the decision of this case, and if we are to attach to these words their scientific or physical meaning—that is, that the action of the company was inevitable, or could not have been otherwise—its liability would at once be fixed, as it might have stopped its trains or declined to receive freight or passengers unless upon the agreement that the delay in transportation should relieve it from responsibility. Under such a ruling the cooking of food or the feeding of stock on the Sabbath might be dispensed with, and every other necessity in the way of labor that was not indispensable to man's existence. Could this have been the legislative intent when using such language in the statute? or shall we not interpret the words as having a legal meaning designed to apply to the wants of the citizen, adopting the language in its construction to the manner, habits, wants and customs of the people it is to affect? and in many cases the rights and duties of those charged with a public or private duty and the obligations they are under to others must also be considered in determining the character of labor falling within the statutory prohibition. It is argued,

in the case of Sparhawk *v.* The Union Passenger Ry. Co., reported in 54 Pennsylvania, that it was not intended by such acts to exempt the party charged from the prohibition of the statute because his labor was a work of necessity to others, but it must be a work of necessity to him who does the labor. We do not so construe the statute. If so, why protect the apothecary who sells his medicines for the relief of the patient, or the dairyman who furnishes the milk for his customers, or the hotel-keeper who furnishes his guests with food and lodging. It is the exigency of the object to be accomplished that determines to a great extent the means to be resorted to for that purpose. No safer rule, we think, can be established or any better definition given of the word "necessity" than is found in the decision cited as adverse to the views herein expressed, and that is: "The law regards that as necessary which the common sense of the county, in its ordinary mode of doing business, regards as necessary. The change in the habits and customs of the people and the mode and character of transportation and travel make that a necessity at this day that half a century since would not have been so regarded."

It is impossible, and certainly not practicable, to draw the line of distinction with certainty between works of necessity and such labor as falls within the denomination of the statute, and we are not disposed to venture so far as to attempt to place a limit to the meaning of the word necessity, when applied to the wants of man. In the case of McGartvick *v.* Wasson, reported in 4th Ohio State, it was held that works of necessity are not limited to the preservation of life, health or property from impending danger. "The necessity may grow out of, or indeed be incident to, the general course of business, or even be an exigency of a particular trade or business, and yet be within the exception of the act. Hence the danger of navigation being closed may make it lawful to load a vessel on Sunday if there is no other time to do so."

In the case of the Philadelphia and Baltimore R. R. Co. *v.* Steam Towboat, reported in 23 Howard, the court said: "We have shown in our opinion, delivered at this term, that in other Christian countries, where the observance of Sundays and other holidays is enforced, by both church and state, the sailing of vessels engaged in commerce, or even their loading and unloading, were claimed among works of necessity which are exempt from the operation of such laws. This may be said to be confirmed by the usage of all nations, so far at least as it concerns commencing a voyage on that day.". Railroad companies or carriers of passengers furnish at this day almost every accommodation to the traveller that is to be found in the hotels of the country; his meals as well as his sleeping apartments are often furnished him, and to require the train when on its line of travel to delay its journey that the passenger may go to a hotel to enjoy the Sabbath,

where the same labor is required to be performed for him as upon the train, or to require him to remain on the train and there live as he would at the hotel, would certainly not carry out the purpose of the law, and besides, the necessity for reaching his home or place of destination must necessarily exist in so many instances as to make it indispensable that the train should pursue its way. So of trains transporting goods, merchandise, live stock, fruits, vegetables, etc., that by reason of delay would work great injury to parties interested. A private carriage, in which is the owner or his family, driven by one who is employed by the month or year to the church in which the owner worships, or to the house of his friend or relative on the Sabbath, is not in violation of the statute. So in reference to the use of street railroads in towns and cities on the Sabbath day. Those who have not the means of providing their own horses or carriages travel upon street cars to their place of worship or to visit their friends and acquaintances, and such is the apparent necessity in all such cases that no inquiry will be directed as to the business or destination of the traveller, whether on the one car or the other, nor will an inquiry be directed as to the character of the freight being transported. Nor will the person desiring to hire the horse from the livery stable be compelled to disclose the purpose in view in order to protect the keeper from the penalty of the law. Such employments are necessary, and not within the inhibition of the statute. The common sense as well as the moral sentiment of the country will suggest that the merchant who sells his goods, or the farmer who follows his plough, or the carpenter who labors upon the building, or the saloon-keeper who sells his liquors on Sunday, are each and all violating the law by which it is made penal to follow the ordinary avocation of life on Sunday. The ordinary usages and customs of the country teach us that to pursue such employments on the Sabbath is wrong. Every man realizes the distinction between pursuing such avocations and that of transporting the traveller to his home, or the pursuit of such employments as must result from the necessary practical wants of trade.

This statute is only a civil regulation enacted from motives of public policy alone, and to discuss it in a religious point of view would be to attribute to the Legislature the exercise of a power it does not possess—that is, to enforce the performance of citizens' duties.

Judgment affirmed; Judge Hargis dissenting.

A like result was arrived at by the Supreme Court of Indiana in the case of Youski v. State, 5 Am. & Eng. R. R. Cas., 40.

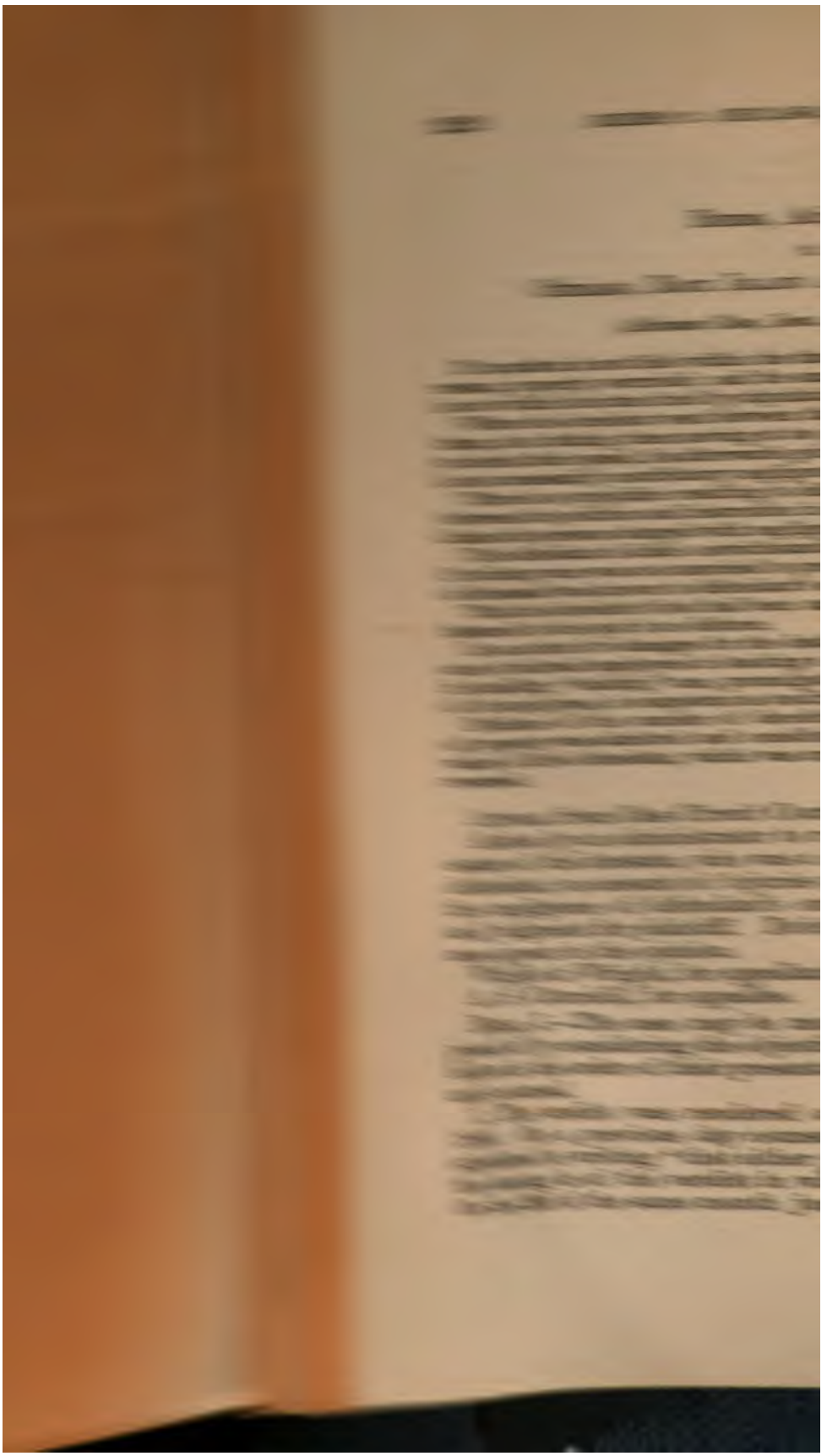
In the note to that case as reported in that volume are collected and cited nearly all, if not all, cases touching statutes similar to the one quoted in the principal case.

So liberal has been the various courts' construction of the words "works

of charity or necessity excepted," or similar expressions, that one is lead to think that they would by construction, had these words been omitted from the statute, drawn the exceptions which the legislative bodies drew by positive enactment. Two instances of such a construction can be found in the decisions of the Supreme Court of Indiana alone. Thus by the terms of a statute railroad companies were compelled to fence their right of way. To follow the literal words of the statute, they would have to run their fences across all public highways wherever they crossed their right of way, to the extent of placing them in the public streets of a city or town. The court held that an exception was implied as to such highways and streets, and that the railroad companies could not lawfully obstruct them with their fences. Lafayette and Indianapolis R. R. Co. *v.* Shrines, 6 Ind. 141. So where a statute prohibited a sale of intoxicating liquors in less quantity than a quart by any one except those properly licensed to engage in such sales, and made no exceptions as to sales for medicinal purposes, the court, looking at the entire statute, and its object being to prevent the undue use of intoxicating liquors, held that such a sale was not prohibited by the statute. Donnell *v.* State, 2 Ind. 658; Jakes *v.* State, 42 Ind. 473. Both these statutes, the one relating to the sale of intoxicating liquors, the other to the fencing of the railroad's right of way, were in derogation of the common law; for by that law the sale of liquors was free and untrammeled, and in the case of owners of stock they were bound to keep them upon their own premises, and if they strayed off upon the lands of another they became wrongdoers. Wells *v.* Howell, 19 Johns. 385; 3 Blacks. Com. 209, 211. Consequently a strict construction was given them both. So of the act enforcing rest from the ordinary and common labor of the week. Common labor on such a day is not a common law offence. State *v.* Brooksbank, 6 Ired. (N. C.) 73. A review of all the cases, it is believed, will lead to the conclusion that all courts give statutes declaring the Sabbath a day of rest a strict construction, and do not enforce their provisions, criminally, as strictly as the great body of statutory law usually is enforced.

The authorities upon the principal point decided in the principal case are few in number, and some are merely dicta. In Commonwealth *v.* Jeandell, 2 Grant, 506; S. C., 3 Phila. 509; and Sparhawk *v.* Union Pac. Ry. Co., 54 Pa. St. 401, held that running street cars on Sunday is against the statute. This has been changed by statute. 2 What. Crim. L., sec. 1431a, note 7 (8 ed). But it is to be observed that no conviction ever occurred under these decisions. On the contrary it was intimated in Augusta, Railroad *v.* Renz, 55 Geo. 126, that no conviction could be had under the statute for running street-railway cars. It was said: "In view of the dependence of the people for travel, in the cities where street-railroads have been established, by that mode of conveyance in going to church, visiting the sick, etc., we are not prepared to hold that the running of street-railroads in cities and the vicinity thereof where the same have been established, on Sunday, is not a work of necessity." Sec. 19, Amer. L. Reg. 137.

As in the principal case, so in another case it has been held that a corporation can be indicted for violating the Sunday law; but proof that one train was run over her road on Sunday is not sufficient proof that such train was run with her consent or by her authority. State *v.* B. and O. R. R. Co., 15 W. Va. 362.



verdict. On the 23d, defendant filed a motion in arrest and for a new trial, and on the same day moved for judgment non obstante. On the next day plaintiff moved to strike out the motion for a new trial, on the ground that it came too late. On the 26th, defendant moved to set aside the judgment, and made a showing against plaintiff's motion to strike out. The showing against the motion to strike out was, in effect, that one of the counsel of defendants engaged in the trial of the case left for another court before the verdict was in. In the intervals of business he prepared the motion for a new trial, and on the 19th sent it to one of his associate counsel residing at the place of trial. It was left at the house of the attorney, who was absent, and was not filed until the 22d. The court overruled the motion to strike out the motion for judgment non obstante, the motion in arrest and for a new trial, and the motion to set aside the judgment.

We think the several rulings are correct. It may be admitted that the judgment, being entered on the 22d of November (the 21st being Sunday), was rendered before the expiration of the time fixed by the stipulation of the parties for filing motions. The entry of the judgment, however, was no impediment in the way of defendant presenting his motion for a new trial. If that motion had been sustained the judgment would have been set aside. We believe that it often occurs in practice that judgments are entered before motions for new trials are disposed of. If such motions be sustained, the judgments are regarded as being set aside by the orders granting new trials, or such orders expressly provide that the judgments be set aside. Defendant's showing, in excuse for delay in filing his motion for a new trial, may be considered in connection with that motion, which, it must be admitted, was not filed within the time fixed in the stipulation of counsel. If it be conceded that the delay in filing the motion for a new trial may be excused upon proper showing of diligence on the part of defendant, or that it was the result of accident or misfortune, we are of the opinion that the showing of defendant's counsel fails to make out such a case.

2. The motion for a new trial was filed on the twenty-third of November, which was more than five days from the coming in of the verdict. See Code, § 45, par. 23. The parties, by the stipulation, did not waive the effect of Code, § 3838, further than to substitute five days in the place of three for the filing of the motions contemplated. If the motions were not filed within the time prescribed by the statute, it was for that reason properly overruled. Boardman *v.* Beckwith, 18 Iowa, 292; Clinton Nat. Bank *v.* Graves, 38 Iowa, 228. The same result must follow when the filing is not within the time fixed by the agreement of the parties. The motion for a new trial was properly overruled, and the court rightly refused to set aside the judgment, upon the ground that it was

entered before the time for making a motion for a new trial, as fixed by the agreement, had expired.

3. We will next consider the action of the court in overruling the motion for judgment non obstante. The intestate met his death in making an attempt to uncouple the tender from the car. The special findings of the jury show that when he went between the cars to uncouple them, they were moving at an improper and unusual rate of speed. Counsel for defendant insists that this finding establishes the fact of contributory negligence on the part of the intestate. The petition alleges that defendant's employees in charge of the engine were negligent in failing to obey a direction given them by a signal made by the intestate to check the speed of the cars. The testimony tends to support this allegation. The jury were authorized to find from the testimony that deceased made two attempts to uncouple the cars while they were moving. After the first attempt he came out from between the cars and signalled directions to check their speed. He immediately went again between the cars to make the second attempt to uncouple them. His signal was not obeyed. He was authorized to believe that the motion of the car would be checked, and he was not required to wait before acting, to discover whether obedience would be given to his signal. The jury could have found that after the signal had been given, and after he had gone between the cars, if their speed had been checked he would not have been exposed to danger. His act, therefore, in going between the cars after having made the signal to check their speed, was not necessarily contributory negligence. Speed *v.* Central R. of Iowa, 43 Iowa, 109. The special findings of the jury are therefore not inconsistent with the general verdict.

4. Counsel for defendant complain of certain instructions given to the jury, and the refusal to give an instruction asked by defendant. Plaintiff's counsel insist that no exceptions were taken to the instructions in the court below, except on the motion for a new trial, which, as we have seen, was not filed in time, and for that reason was properly overruled; and an amended abstract filed by plaintiff shows that no exceptions to the rulings upon instructions were taken at any other time. But the correctness of the amended abstract upon this point is denied by defendant. We have therefore found it necessary to examine the manuscript record, and find that the rulings upon the instructions were excepted to at the time they were given. This is sufficient to require us to consider the questions discussed by counsel touching the instructions, though it may be conceded that the exceptions were not saved by the motion for a new trial, for the reason that it was not filed in time. We will proceed to consider the objections discussed by counsel which are based upon the instructions given and refused.

5. The fifth instruction given, in stating the acts of negligence

charged by plaintiff, uses this language: "The third cause of complaint is that the parties in charge of the engine moved the train at an unusually fast rate of speed." The petition, in charging negligence, contains this comment: "The engineer . . . carelessly and negligently backed up the said train unusually fast." Counsel insist that the statement of the instruction is broader than the language of the petition just quoted, in that by the use of the plural "parties," it applies to the fireman, who was upon the engine assisting the engineer, and he is not charged with negligence in the petition. If the fireman was operating the engine, or assisting in that work, he must be regarded as an engineer. And if there were two engineers, the language of the petition is applicable to the one who was guilty of negligence, or to both, if both were negligent. The allegation of the petition charges negligence upon the engineer. There is no rule of pleading which limits the averment of negligence to one engineer on the ground that the singular number is used. So the instruction, by the use of the plural "parties," is applicable to one engineer, if there was but one. We can discover no possible prejudice resulting to defendant from this want of agreement between the petition and instruction in the number of the names used to indicate the persons charged with negligence.

6. The sixth instruction given directed the jury, in substance, that plaintiff's negligence will not relieve defendant of liability, if the negligent act of defendant, which caused plaintiff's injury, was done after the discovery of plaintiff's negligence, and defendant could have avoided the accident by the exercise of ordinary care. This rule is stated in the instruction as being an exception to the doctrine that defendant is not liable if the plaintiff contributed to his injury by his own negligence. Counsel for defendant insist that the negligence of the intestate existed, notwithstanding the knowledge by defendant of such negligence, and want of care to avoid the accident, and that the instruction is to the effect that intestate was not to be regarded as negligent if his want of care was known to the defendant, and no care was exercised by its employees to avoid the accident. We think the instruction will not bear this construction. It very clearly expresses a correct rule of the law, namely, that defendant is liable, notwithstanding intestate's negligence, if ordinary care was not exercised to prevent the accident after the intestate's negligence was known to defendant's employees. The form of the instruction is not important if it expresses with sufficient clearness the rule of law. Counsel insist that the instruction "submits a new charge of negligence, viz., a failure to exercise due care after discovering the danger of the deceased." The rule presents no new issues involving the negligence of the parties. If defendant was not negligent, plaintiff cannot recover in any event. If defendant was negligent and knew of intestate's

negligence, it is liable. The rule has no relation to the original issues of the case concerning care or negligence, but involves an issue relating to defendant's knowledge of the intestate's negligence.

7. The court instructed the jury that if intestate's foot was caught between the rails, and he "was thus held and run over, without any negligence on the part of the other employees of defendant, such as is charged in the petition, then the plaintiff cannot recover anything." The defendant asked an instruction, which was refused, to the effect that if the intestate's foot was caught between the rails the defendant is not liable, even though the jury should find the negligence charged in the petition. The instruction given is correct. If intestate was run over by reason of defendant's negligence, surely it cannot be claimed that defendant is not liable, because intestate's foot was caught between the rails. It would be a strange doctrine to hold that defendant could back its trains with unusual speed, without obeying signals to move more slowly, and thus negligently run over a brakeman, and would not be liable for the reason that the unfortunate man was fastened to the spot by his foot being held between the rails. Whatever was the intestate's condition at the time of the accident, whether free to move or fastened to the place, the defendant is liable if its cars were negligently driven over him.

8. The circuit court, against defendant's objection, admitted in evidence certain rules, promulgated by the company, for the control of its enginemen and firemen. The rules require caution in handling cars when "backing," and direct the employees to "look back frequently to see that all is right." They hold enginemen accountable for their violation. We think the rules were competent evidence. If it should appear that defendant's employees violated these rules defendant could not surely deny that they were negligent. The train was backing at the time intestate was killed. The rules, taken together, directed the employees of defendant as to their duty when backing trains as well as when moving them forward. They were, we think, applicable to the service in which the employees were engaged at the time of the accident.

9. The verdict, we think, finds sufficient support in the testimony. We are not accustomed to discuss the evidence in similar cases. Counsel for defendant have not done so in this case, and, doubtless, do not expect it from us.

10. The plaintiff was permitted to show, against defendant's objection, the number of the family of the intestate, and the amount of the property he had accumulated. The admission of this testimony is the ground of an objection to the judgment urged by counsel for defendant. Mr. Justice Rothrock and myself concur in the opinion that the testimony was rightfully admitted. We think it tended to show circumstances stimulating the intestate to industry and providence, which would largely add

to the value of his personal service to his own estate. The fact that the intestate had accumulated property while supporting his family, would tend to show the exercise by him of industry and economy,—virtues that rendered his life more valuable in the acquisition of property, the only standard of value of life that may be considered of value in this case. Evidence similar to the testimony complained of was admitted and held competent in Simonson *v.* C., R. I. and P. Ry. Co., 49 Iowa, 87.

The other members of the court unite in the conclusion that the testimony was incompetent, and that the court erred in admitting it. For this error they think the judgment of the circuit court ought to be reversed. Their views and conclusions are expressed in an opinion prepared by Mr. Justice Day, and in accord therewith, as the decision of the majority of this court, the judgment of the circuit court must be reversed.

DAY, J.—The evidence shows that the deceased was, at the time of his death, 24 or 25 years of age, and that he had been at work for himself since he was 19 years of age. Against the objection of the defendant the plaintiff was permitted to prove that deceased has a wife and two children, and some accounts which were worthless, and furniture of the value of $150. The appellee's attorney insists that this evidence tends to show deceased's ability to earn money, and that it was properly admitted, under the principles announced in Simonson *v.* C., R. I. and P. Ry. Co., 49 Iowa, 87. In this case it was held that the jury might properly consider the fact that a young man, 17 years of age, had no money and was dependent upon his earnings, as a circumstance in regard to the probable continuance of his industry. It was said that "it is nearly certain that a young man dependent upon his earnings will earn something." This case goes to the verge of propriety, and beyond the doctrines announced in it we are unwilling to go. It is competent to show what a party earned during his life, as that has some bearing upon the probable loss to his estate by his death. It may also be competent to show that the deceased was a married man, for, from observation and experience, it may fairly be assumed that a married man will be more frugal and industrious, and hence will accumulate a larger estate than a single man. But observation and experience do not teach that one's income is likely to increase in the same ratio as the number of his children. There is no rule of law under which the estate of a deceased father of a dozen children can properly recover, on account of his death, more than the estate of such a father of one child or of none. The real question in this case is, what was the value of the deceased's life to his estate? The number of his children can have no legitimate bearing upon that question, although it may furnish the ground of an earnest appeal to

the sympathy of the jury, and we have no doubt that that is the real purpose for which such testimony is offered.

SEEVERS and ADAMS, JJ., concur in these views.

It follows that, for error in the admission of this evidence, the judgment must be reversed.

See next case.

THE ATCHISON, TOPEKA, AND SANTA FE R. R. CO.

v.

JOSEPH BROWN, Adm'r, etc.

(26 *Kansas Reports*, 443. *July Term*, 1881.)

Where in an action against a railroad company the jury returned a verdict against the company, and also made certain special findings of fact, and the company made a motion for judgment upon those findings, the verdict to the contrary notwithstanding, which motion was overruled by the court, and thereafter the company made a motion to set aside the verdict and judgment and for a new trial, which motion was sustained, *held*, that as no judgment had been rendered against the company and no final order made against it, no petition in error would lie in this court to review the action of the district court in refusing a judgment upon the special findings in favor of the company. (Burton v. Boyd, 7 Kas. 17.)

One Wm. Haas, a yard switchman in the employ of the defendant, was, while attempting to make a coupling of two freight cars, so injured that death ensued. His administrator, charging negligence upon the company, brought suit under the statute to recover damages for the next of kin. It appeared that the deceased was a single man, leaving neither widow nor child surviving him; that his nearest relative was a mother possessed of some means; and from the history of the young man, that his past life had not been and his future life probably would not be of any great pecuniary value to his mother. The jury awarded the full statutory limit, $10,000. The district court set aside the verdict as excessive. *Held*, that such ruling must be sustained; that while no arbitrary rule of computing the value of the life of a deceased can be laid down, and much must be left to the discretion of the jury, yet it was not the intention of the statute to merely mulct a defendant in damages for negligence, nor to make death a pecuniary speculation to the next of kin, but the intention was to make good to the next of kin the actual loss sustained by such death; and in determining such loss many things should be considered by the jury, among them, whether the next of kin was legally or in fact dependent upon deceased for support, whether the relative pecuniary situation of the deceased and the next of kin was such as to show that probably the next of kin would receive any portion of the deceased's earnings, and also whether the past history of the deceased tends to show that the next of kin would be likely to receive any benefit from the continuance of his life.

ERROR from Lyon District Court.

Action brought by Joseph Brown, as administrator of the estate of William Haas, deceased, against the railroad company, to

recover damages alleged to have resulted from the negligence of the defendant in wrongfully causing the death of said Haas. Trial at the March Term, 1881, of the district court, when the jury made certain special findings of fact, and rendered a verdict for plaintiff for $10,000. The court refused to give defendant a judgment upon the special findings, but granted it a new trial. Both parties bring error to this court. The opinion states the facts.

Geo. R. Peck and J. Jay Buck, for plaintiff in error:

1. The court should have instructed the jury on the evidence for the defendant, and especially should have given defendant judgment on the special findings. (Dryden *v.* Leach, 26 Law Jurist, 221, reported in 5 Law Reg. 745; 71 Ill. 238; 5 Ohio St. 541; 28 id. 341; 21 Wis. 382; 33 Md. 588; 25 Kas. 188.)

2. Negligence cannot be inferred from a mere act which is the cause of the injury, unless the injury is the necessary and usual consequence of the act. (Wood *v.* Ry. Co., Sup. Ct. Wis., Feb., 1881, 9 Rep. 771.)

3. Haas knew the danger and was bound to avoid it, or he must be treated as having assumed all the risks incident thereto. (26 L. J. [N. S.] Exch. 221; 9 Exch. 223; 51 Miss. 637; 49 Cal. 192; 44 id. 187; 50 Ga. 465; 61 Pa. St. 58; 63 id. 146; 76 id. 389.)

4. The court referred the question of exemplary damages to the jury. This was error, for there was neither malice nor wanton negligence on the part of the defendant corporation. (21 Wend. 618; 8 id. 472; 8 Johns. 92; 13 id. 131; 36 Wis. 35; 19 Kas. 496; 36 Conn. 182; 4 Cal. 298; 71 Ill. 177; 74 id. 421; 82 id. 550; 91 U. S. 489; 59 Mo. 27; 56 N. Y. 44; 48 Vt. 403.) No exemplary damages can be allowed by the statute. (Cooley on Torts, 271.)

5. There was some evidence before the jury of a ditch at some point in the defendant's yard, temporarily made to carry off the surface water caused by a recent rain. The weight of the evidence clearly located this ditch at least a hundred feet from the place of the accident. It was clearly the right and privilege of the corporation to dig a ditch if needed, and its existence could not be charged or treated as negligence. (2 Neb. 319. See also 62 Mo. 232; 67 id. 239; 71 id. 66; 47 id. 567; 29 Conn. 548.) Because, if the defect in that yard was patent and open to observation, or such as the ordinary use of the servant would have disclosed or observed, he was bound to know it.

6. The case was tried below by the plaintiff and court upon the theory that once the injury was shown the burden thereafter rested upon the defendant. From the very nature of the case, the burden was upon the plaintiff throughout, and the jury were not properly instructed. (75 N. Y. 332; 18 id. 248; 35 Me. 422; 18

id. 32; 42 Ala. 672; 36 Mo. 13; 27 Vt. 643; 39 Md. 329; 38 id. 588; 35 Ohio St. 627; 11 Kas. 83–90.)

7. The questions persistently directed by plaintiff's counsel, the objections interposed by defendant, and the rulings of the court in relation to the loading of the flat car, compelled the jury to understand that such cars must be loaded simply in view of the convenience of coupling and uncoupling them, entirely losing sight of the more important feature of their transportation through long distances.

8. No rule is more familiar than this, that the servant is bound to use care, and cannot recklessly disregard all danger, and, when injured, look to his employer for redress. (Dryden *v.* Leach, supra; 4 Oreg. 52; 29 Conn. 558; 47 Ind. 454; 31 Cal. 376; 2 id. 78; 6 Iowa, 443; 49 Pa. St. 60; 53 id. 255.)

9. Where the servant has equal knowledge with the master of the danger incident to the work, he takes the risk upon himself. (11 Wall. 554; 41 Md. 298; 46 Cal. 409; 1 Coldw. 612; 25 Ala. 659; 30 Wis. 674; 113 Mass. 398; 8 Wright, 175; 13 id. 60.)

10. The proof was conclusive that Haas had plenty of railroad experience before taking employment of the defendant; and if he knew the dangers there to be met with, and was injured by them when he could easily have avoided such injury, the defendant is not liable. (20 Mich. 105; 8 N. Y. 175; 25 id. 566; 6 Barb. 243; 20 id. 449; 6 Hill, 592; 67 Ill. 498; 5 Ohio St. 541, 565; 2 Am. L. R. 248; 31 Cal. 376; 102 Mass. 579, 596; 32 Mo. 411; 9 Cush. 112; Hughes *v.* Winona, etc., R. R. Co., Sup. Ct. Mich., July, 1881.)

11. The defendant below requested the court to have the jury answer special findings numbers 6, 7, and 10. Not only this, but the court tells the jury in instruction No. 21 not to answer these three questions. These questions were "material to the case, and based upon the evidence," and it was error to refuse them. (25 Kas. 189, third point in syllabus.) These findings had reference to the measure of damages, and the paper upon which they were printed went to the jury with those numbers erased by the court. For this reason, even though the jury in part answered some of them, they clearly understood that it was wholly immaterial whether Minnie Haas would, in the natural order of things, survive her son or not.

12. The damages in this case are notoriously excessive. They are the extreme limit of the statute—all that a widow with a family of small children could possibly have claimed, be she ever so poor and dependent upon the labor of her husband. This is a case prosecuted in the interest of a rich mother to recover for the loss of a son, who, when comparatively idle, had lived at her expense for years; and while temperate in his habits, was of a roving disposition, had never aspired to anything more than manual labor,

and with a robust constitution, at the age of nearly twenty-six years died, leaving an estate of $37.10. This verdict of itself, as to the measure of damages, is its own refutation. Besides, our statute give the highest damages of any statute upon this subject. (8 N. W. Reporter, 522; 8 Gray, 45; 21 Wis. 380; 22 id. 586; 29 id. 584; 87 Ill. 131, 245; 86 id. 296, 212; 37 N. Y. 288; 38 id. 450; 10 Kas. 524; 18 Mo. 164; 31 Pa. St. 273; 33 id. 318.)

13. Damages should be calculated on reasonable expectation of benefit. (54 Pa. St. 495; 7 Am. Rep. 450; 47 N. Y. 317; 25 Ohio 510; St. 66 N. C. 154.)

14. We complain of instruction No. 22:

"The burden of proof is upon the plaintiff to prove all the material allegations of his petition not admitted by the defendant, and upon the defendant to show contributory negligence on the part of the deceased by a preponderance of the evidence in the case."

In a case where the connection of the deceased with the accident is shown by the plaintiff in making out his case, as in the case at bar, the better doctrine is, that the burden is upon the plaintiff to show the deceased free from fault. If it were the case of a passenger or a stranger, when the mere injury suggested negligence, the rule would be as the court intended to give; but not so here. Again, the court does not inform the jury, nor do they know what allegations are "material," nor is the court clear as to the burden until it reaches the defendant, when it says that he must show contributory negligence by a "preponderance of the evidence in the case," leaving the jury not only to infer, but to understand that the burden on the defendant is the greater. If this order is correct, we were prejudiced by the manner in which it was manifested. A proposition may be correctly stated in the abstract, and yet be misleading. (19 Ohio St. 110; 24 id. 668.)

15. We were entitled to a judgment for costs; its denial was prejudicial to us, and the order of the court below overruling our motion and demand for judgment "involves the merits of this action."

We believe that this case comes within the third subdivision of § 542 of the code; and claim, as a matter of law, that when the court below overruled and denied our motion for a judgment, it made just as much of an "order" as though it had granted our motion. It is only a ruling for plaintiff, instead of defendant.

We think the case at bar distinguishable from that of Burton *v.* Boyd, 7 Kas. 17, for in that case the findings of the jury were against the party moving for a new trial. Here we claim that all the findings touching plaintiff's right to recover are in favor of the defendant below. The refusal to give us judgment was material error, affecting the substantial rights of the complaining party. This error was not cured by the granting of a new trial. If our

substantial rights were injured, we are entitled to a remedy, and if a new trial is insufficient to give us what we are entitled to under the law, then we cannot be estopped by the statement that a new trial protects us in our rights.

Granting a new trial shows that in the opinion of the court below the opposite party was not entitled to a judgment, but does not prove that we are not deprived of some substantial right which might have been corrected without a new trial. True, we asked for a new trial; but can it be held that this deprives us of any other remedy provided by law? We do not think we waive any of our rights by asking and obtaining a new trial. If upon the special findings we are entitled to a judgment, would it not be wrong to put us to the expense of another trial? The very "justice of the case" requires, as a matter of law, judgment to be entered for the defendant when the merits of the case, as disclosed by the special findings of fact, show that the general verdict is inconsistent therewith. (Code, § 287.)

This case then is very similar to a case upon a demurrer to the evidence. In the one case the jury say what the facts are; in the other, the party by demurring to the testimony of the plaintiff, admits it to be true. In either case the question arises, to what judgment, if any, do the facts entitle the plaintiff? If a demurrer to the evidence is overruled, the defendant may, after he has made a motion for a new trial have the error reviewed; and the question involved, if the evidence is all presented to this court, is not alone whether a new trial should be granted, but whether or not the evidence so demurred to entitles the plaintiff in error to a judgment. This court will presume that the plaintiff below presented all his evidence. And if all the evidence did not entitle him to recover, what reason would there be in remanding it for a new trial? So here, if the evidence supports the special findings, and these findings do not show any right to recover, why say that the defendant below must take a new trial?

Scott & Lynn, for defendant in error:

1. The district court erred in granting defendant's motion for a new trial on the ground named in its motion, to wit: excessive damages appearing to have been given under the influence of passion or prejudice. (Field on Damages, § 882.) The verdict having been rendered under proper instructions of the court, in harmony with the principles governing this class of cases as laid down in K. P. Ry. Co. *v.* Cutter, 19 Kas. 83, we insist that the court had no right to disturb it. The legislature having fixed the maximum of damages recoverable in such cases, we submit that no verdict, not in excess of such amount, is or can be excessive, and that the limitation in the statute is expressive of the legislative idea of what would or would not be excessive. The proper construction of that statute is to make the jury, under the facts of the

case, when brought within the law, the exclusive judges of the amount of damages up to the limit fixed by the statute, and it has been held that when the statute makes the jury the sole judges of the amount of damages, the court cannot disturb their finding. (27 Miss. 423.) This act is in the highest sense remedial, and is entitled to receive the liberal construction which appertains to such statutes. (2 Vroom, 349.)

The court had no right to disturb the verdict in the face of the statute, and especially in the absence of any proper showing. (62 Pa. St. 329; see also 2 Sedgw. on Dam. [7th ed.] 652–655, note a.) Even where it has been held that the power to disturb the verdict as being excessive, rests in the discretion of the court (20 Ga. 428), yet this discretion does not supplant that of the jury. The court must decide whether there is enough evidence to support the verdict, and if in its opinion there is sufficient, then the discretion of the court ceases. Beyond that point the discretion of the jury is unrestrained. Hence it follows that verdicts are often sustained, although they do not meet with the full approval of the court. (61 Ill. 287; 5 Ind. 224; 23 Barb. 639; 4 E. D. Smith, 110.)

We might for argument's sake grant that the verdict is large; but if we admit it to be excessive, that is no ground for a new trial. The statute says, "excessive damages, appearing to have been given under the influence of passion or prejudice" (Code, § 306.) This court has decided that "the mere fact that damages are excessive, is not ground for a new trial. They must appear to have been given under the influence of passion or prejudice." (16 Kas. 456.) The law is, however, that the verdict must be so flagrantly excessive that the mind at once preceives it to be grossly unjust, or such as to warrant the belief that it was brought about by corruption, malice, or other undue means. (1 Minn. 156; 10 id. 350; 8 id. 154; 27 Mo. 28; 21 id. 354; 8 Rich. [S. C.] L. 144; 25 Ark. 381; 27 Miss. 68; 53 How. Pr. 385; 54 Ga. 224; 12 Barb. 492; 19 id. 461; 24 Cal. 513; 36 id. 590; 516 Ill. 405; 7 id. 432; 38 id. 242; 13 N. J. L. 294; 32 id. 70; 19 Conn. 317; 1 Bibb, 247; 16 Me. 187; 16 Pick. 541.)

Granting or refusing a new trial for any ground mentioned in the statute may be reviewed like any other final order or judgment. (Dass. Comp. Laws, § 542, p. 674.) The granting of a new trial on the ground of excessive damages is a question of law, and if the court errs in so doing, it is the duty of the court of errors to reverse the judgment. (34 Wis. 188.)

Although pain and anguish cannot be considered in a death case, courts rightly consider death the most damaging species of personal injury. (8 Kas. 656; 9 Heisk. 829.) The following cases will illustrate what the courts of the country think are not excessive verdicts; 19 Kas. 488; 11 id. 8; 14 id. 520. In Shaw *v.* B. and W. R. R. Co., 8 Gray, 46, there were three verdicts for $15,000, $18,000

and $22,250, for personal injuries less than death; last verdict sustained. When a lawyer suffered permanent injuries less than death a verdict for $20,000 was sustained. (63 Barb. 260.) Permanent injuries less than death to a common laborer were held to warrant a verdict of $15,000. (13 Nev. 106.) In a case of injuries to a brakeman less than death, $12,000 was held not to be excessive. (50 Tex. 254.) In case of a brakeman getting $540 per annum, and being 30 years old, $11,000 was held not to be excessive for permanent injuries less than death. (43 Iowa, 662.) Permanent injuries less than death to a female school teacher, were held to justify a verdict for $8958. (88 Ill. 377.) In case of a common teamster suffering permanent injuries less than death, $9500 was held not excessive. (62 Me. 552.) In Wisconsin, where the court is very strict on damages, it sustained a verdict of $5500, where a sailor got one leg and two ribs broken, which confined him ten or twelve days in bed. (28 Wis. 569.) In a criminal conversation case, $10,000 was held not excessive. (4 E. D. Smith, 110.) A verdict for $200 in a death case was held so grossly inadequate that it was set aside. (46 Cal. 26.) In case of killing an infant daughter, a person from whom the least can be expected, the next of kin recovered $5000, and the verdict was sustained. (42 Cal. 216.)

It was suggested below that the relation of this mother to her son would not warrant as much damages as a needy wife and children. If this be the law, it is the first case we are aware of where poverty or wealth cuts any figure in the amount of recovery. If such were the law, it would pay railroads to employ none but men of wealthy families, for in such case, the next of kin not needing his support, could not recover if he were killed. This court says such is not the law. It is not to be determined by the needs of the survivors. (19 Kas. 91; 29 Gratt. 431, 570; 84 Pa. St. 419; 48 Tex. 372; 9 Heisk. 12, 841; 4 Col. 162.)

A new trial should not be granted for excessive damages, when the only defence at the second trial will be one that goes in mitigation of damages. (1 Bibb, 354.)

The jury were bound to consider all this evidence showing the relations of the deceased and his next of kin, his intelligence and vigor, the salary he was obtaining, his savings, and the fact that he was engaged in an employment which has a regular system of promotions, and that he was an attentive, intelligent, and energetic man, who had already been advanced by the defendant after two weeks of service, and would, in all probability, in time have earned a much larger sum than $684 in a higher position, if the possibilities of the future had not been forever closed to him by his untimely death. (19 Kas. 488–494; 43 Iowa, 676; 16 Irish L. R. [N. S.] 415.)

2. The defendant sought to prove by different witnesses that it was the custom of railroad companies throughout the country to

load long and projecting timbers on one car, we suppose, for the purpose of establishing that the flat car in question was not negligently loaded. To this character of testimony the plaintiff objected; the objection was sustained, and on the argument of the motion it was strenuously insisted that this testimony was improperly excluded, and that the ruling is error. The offered testimony was properly excluded. (107 Mass. 496; 109 id. 126; 1 Allen, 187; 8 id. 564; 8 Gray, 547; 55 Me. 444; 2 McLean, 157; 50 Md. 5; 91 U. S. 454; 31 Ala. 501; 3 Cush. 174; 50 Ill. 61; 7 Mo. App. 358; Lawson on Usages and Customs, 328; 17 Wall. 357.)

3. The railroad company, on its motion for a new trial, contended that the question propounded to Mr. Ferren was improper, he not being an expert. This question involved how far over the timbers projected—an unmeasured distance, upon which any witness may give an opinion. (14 Kas. 110; 24 id. 453; 117 Mass. 122.)

4. Another and most important point is, have we any cause of action? The court below thought we had, and overruled that part of the defendant's motion for a new trial. The company also thought we had, as it did not demur to our evidence. However, if we have no cause of action, although the company has waived that question, we should like to know it. A completer man-trap than that in which Haas was caught, was never, in our judgment, invented. The following authorities show this to be a double case of negligence: 50 Tex. 254; 36 Iowa, 31; 8 Allen, 441; 100 U. S. 213; Dass. Comp. Laws, p. 784, §§ 28, 29.

5. It was strenuously insisted by the defendant in the court below that the question of the expectancy of the life of the next of kin, the mother, must be taken into consideration by the jury in determining the damages to be recovered, because, as it was claimed, the deceased being younger, his expectancy of life would be greater, and the probabilities are that but for his unfortunate death he might have outlived her, and no part of his probable future earnings could have gone to her. She might not have lived to enjoy any of his future accumulations, and therefore it is insisted the court erred in not allowing evidence on this point, and not instructing the jury in this regard as requested. Was this error?

We say the damages were fixed at the death of Haas; and so far as prospective increase or decrease of wealth or probable earnings are concerned, or enter into the case, the question is, what would probably accrue to him or to a man of his age? However, the next of kin is not a matter to be tried in the district court in this suit, more than perhaps to show that Haas left some next of kin. It is a matter for the probate court to settle when distribution is made by the administrator. (48 Ill. 410; 82 id. 198; 83 id. 204; Field on Dam., § 634; 46 Iowa, 195.)

The opinion of the court was delivered by

BREWER, J.—Upon a general statement of this case, the facts are as follows: One Wm. Haas was in the employ of the plaintiff in error as a yard switchman in the city of Emporia, in November, 1879, and on the 17th of that month was, while attempting to make a coupling of two freight cars, killed. His administrator brings this action against the company in behalf of the next of kin, and seeks to recover, claiming that the injury resulted from the negligence of the company. The case went to a jury, which returned special findings of fact, and a verdict in favor of the administrator of $10,000. The railroad company made a motion for judgment upon these findings, which was overruled. Thereupon it made a motion for a new trial, which was sustained; and now both parties bring error to this court, one filing a petition and the other a cross-petition in error. The railroad company claims that the court erred in refusing to give it a judgment upon the special findings of fact. The administrator claims that the court erred in sustaining the company's motion for a new trial, and insists that judgment should have been entered in his favor for the amount of the verdict. So far as the error alleged by the railroad company is concerned, it is not one which is now properly reviewable. No judgment has been rendered against the company, and no final order made within the scope of that term as defined in the statute. The case is still pending in the district court. No judgment may ever be rendered against the company, and if not, it has no ground of complaint. It is well known that the old rule was, that no proceedings in error would lie until after a final judgment. Our statute enlarges the matters which may be taken up for review, but nowhere does it, in terms at least, provide for the review of a ruling like that complained of in this case. A question very similar was before this court in Burton *v.* Boyd, 7 Kas. 17, and was there determined adversely to the claim of plaintiff in error. It is true that the facts in that case were not exactly parallel to those in the case before us, yet the proposition in the syllabus fits this case very closely; and resting upon that case as a mere authority, there is no such difference as would prevent the decision there from controlling here. Being a mere question of practice, a decision then made, although open to doubt, should be adhered to, unless plainly wrong, or unless gross injustice would result from adherence thereto. Permanency of forms and practice is a matter always worthy of regard. Until the legislature declares a change, that which has been decided as a rule of practice should very seldom be disturbed. The question is not simply what the present justices consider the true interpretation of the statute, but what has been the announced decision of this court. So far as that goes, and so far as it compels a decision of any question in any case, as a rule it ought to be adhered to. Stare decisis is a maxim which in matters of practice almost absolutely controls. Now that the order complained of is not a final

order as defined by the statute, is not seriously questioned. It is not final because, as the record shows, each party has been remanded to a new inquiry as to rights and liabilities. Counsel for plaintiff in error rest somewhat on the third subdivision of § 542 of the code, and insist that an order overruling a motion for judgment on special findings is "an order that involves the merits of the action or some part thereof." In the case of Stebbins *v.* Laird, 10 Kas. 229, an order granting leave to file an amended bill of particulars was sought to be reviewed by proceedings in error before the final disposition of the case. We held that such an order is not one involving the merits of the action; and while not attempting to define the exact scope of that subdivision, held that it could include only such orders as amount to an adjudication, a disposition of some part of the claim or defence. Now it is plausible to say that denying an application for judgment is an adjudication against the claim or defence, in whatever stage of the proceedings it is made; but such a ruling is not one based upon the testimony, but upon some technical advantage which the state of the findings is supposed to give as against the general verdict, and it does not cut off the party from subsequently pursuing his rights of claim or defence. In this case the defendant is shut off from no defence which upon the merits of the case it may have. There has been no order or ruling which has deprived it of any real defence on the merits. The case goes on to another trial just as though none had been had. Every defence on the merits the company had, it still has. The only effect of that ruling is to deprive it of an advantage which, despite the general verdict against it, it supposed it had, not by reason of the testimony, but by reason of certain findings. At any rate, the ruling does not come so clearly within the scope of such subdivision as to justify us in departing from the former decision of this court. Furthermore, it may be suggested whether the company has not waived its right to avail itself of the error in such ruling, if error there were, by thereafter making a motion for a new trial, and obtaining it. See further, Brown *v.* Kimble, 5 Kas. 80; Edinfield *v.* Barnhart, 5 Kas. 225, in which the court held that an order overruling a motion to dismiss an appeal is not one involving the merits of the action. Also, Dolbee *v.* Hoover, 8 Kas. 124.

The question presented on the cross-petition is, whether the court erred in granting a new trial, and this ruling the statute expressly provides may be reviewed by proceedings in error; but we have repeatedly held that where the ruling of the court below is in favor of a new trial, its proceedings will be scanned with less scrutiny, because both parties have on the second trial a full opportunity of presenting their claims to a new jury. (Field *v.* Kinnear, 5 Kas. 233; City of Ottawa *v.* Washabaugh, 11 Kas. 124.)

Now it is said by counsel for the administrator that the only

ground upon which the court in fact granted a new trial is that of excessive damages. While it is probable that this is so, yet upon the face of the record the motion seems to have been sustained upon other grounds, and therefore such other matters are open for inquiry in this court. Returning, however, to the mere matter of damages, the jury went to the full limit of the statute, and awarded $10,000. The trial court considered this excessive, and so excessive as to warrant its interference. Can we in review say that such ruling was erroneous? We think not. Counsel for the administrator have filed an elaborate brief citing many cases in which large verdicts have been sustained for personal injuries. Their argument is practically this, that if for injuries not taking life large verdicts may be awarded and sustained, that when life is taken no verdict can be declared excessive which keeps within the limits of the statute. We cannot assent to this doctrine. Prior to these various statutes in the several states, it was the accepted law that no action would lie in case of death. To obviate this supposed defect in the common law, these several statutes, taking their origin in Lord Campbell's act in England, were passed. They all aim to give compensation for the life taken away, and various attempts have been made to prescribe some exact rule for computation of the value of the life taken. Several courts have laid down arbitrary rules, but in the case of the K. P. Ry. Co. *v.* Cutter, 19 Kas. 83, following the case of R. R. Co. *v.* Barron, 5 Wall. 90, we held that no arbitrary rule can justly be laid down; that the elements which enter into the just estimate of a life are so varied that the matter must be left, under the direction of the court, to the sound discretion of the jury. The purpose of the statute is compensation, and that up to a certain point the value of the life taken should be paid by the wrong-doer to the parties interested in the life. The statute has put the limit at $10,000. We do not understand that that puts a maximum as the value of the most valuable life, with all other lives to be graduated downward therefrom; and yet we do not agree with counsel that because no man would give his life for $10,000, and that as life and money are not commensurate or convertible terms, no court can say, when a jury awards $10,000 for any life, that it is excessive. It is not the loss of the decedent, but the loss of the survivors which is to be estimated. That involves not merely the probable accumulations of the deceased, but the probability of the benefit of such accumulations inuring to the survivors. Where one who was the head of a family with minor children is killed, there is a reasonable certainty that his earnings if he had survived would inure directly to the benefit of the widow and children. Where one dies without wife or child, with no one legally dependent upon him, and with only remote relatives as his next of kin, there is only a remote probability that his earnings, whatever they may be, would inure to such next of kin. The law

of human experience is, that when a man has no one legally dependent upon him, his earnings, be they great or small, are appropriated to his own benefit or pleasure, so that his life, whatever may be his capacity for earning, has but little if any value to remote relations. Again, when the nearest of kin are not remote relatives, and yet are not in any way legally dependent, the benefit of such life to such next of kin will depend largely upon their needs as well as upon his earnings. Where the deceased, leaving no wife nor child, leaves as his next of kin father or mother, and such father or mother is in good pecuniary condition, it is fair to say that his life would if survived have been of comparatively little value to them. In other words, his earnings would be used for his own pleasure or profit, and not go to the increase of their present good financial condition. The law of human experience and probabilities controls as to these matters. If according to that law the life of the decedent, if continued in existence, would bring little gain to the next of kin, little compensation should be given for his loss. We cannot agree that the theory of the law is to punish for the mere negligent destruction of life; and the law of compensation means that no more should be given to the next of kin that they probably would receive from the decedent if his life had not been taken away. And as before indicated, many matters must be considered in determining how much that life would probably be worth to such next of kin if it had not been taken away. In the case before us the decedent left neither wife nor child; his mother was next of kin, and in determining what would be the probable value of that life to her, regard must be had to what he had done in the past toward her support and maintenance, and what, considering her means and his earnings, as well as his habits and disposition, he would be likely to do in the future. It is not fair to say that all his surplus earnings would go to her, because it is not the law of human experience. If she had means enough for her own support, the probabilities are that none of his earnings would go to her; that in one way or another he would consume them entirely. The statute does not contemplate a speculation on the probable earnings of the deceased; it simply aims to make good to the survivors that which they have probably lost by his death. Of course there is no absolute certainty in matters of this kind. The life taken away to-day by negligence of the defendant, may have been one which by the laws of nature would have passed away to-morrow if no outside accident had intervened, or perchance if it had escaped the negligence of the defendant to-day, it would have fallen a victim to the negligence of some other party to-morrow; so that the real value of the life is problematical and speculative to a certain extent. Of course there are tables of mortality, laws of average, which must be respected and have force in any question which in any degree involves a speculation on the

future; but the laws of probability and average are not to be invoked simply by the plaintiff; they make with the defendant as well, and it is entitled to every solution of probabilities in its favor just as fully as the plaintiff is. It appears in this case that deceased was twenty-five years of age; that about ten years ago he was employed for something less than a year in the post office in Chicago; that at the close of such employment he went out to California, and remained there until 1876. It does not appear that during his employment in the post office in Chicago, or during his absence in California, that his labor was of any value to his mother; on the contrary, it appears that at one time she sent to him a present of $30. In 1876 he returned home; at that time his representations to his mother were that he had accumulated $500 during his absence, but that he had been compelled to use such surplus during a two-months' sickness. He came home without anything, and the first year after his return he did nothing. The next two years he was employed at the gas works for three or four days a month, at $1.50 a day. This during the three years was all of his earnings in Chicago. Aside from that, he collected rents due his mother for certain buildings owned by her, and also made such repairs in those buildings as from time to time their condition demanded. This for three years was the sum total of his labors in Chicago; and a young man who lives in a large city like Chicago for three years, earning no more than he did, must be lacking in either capacity, desire, or need for work. In 1879 he came West, entered into the employ of the Santa Fé road, and remained in such employment for several weeks prior to his death, receiving wages at the rate of $1.90 per day. Was a life such as his had been, and from what it had been, what it promised to be, worth $10,000 to his mother? We are clearly of the opinion that it was not. We think that from the testimony evidently it had been worth nothing to his mother up to the date of his death. From the time that he started out to do for himself up to the day of his death, striking a balance between him and her, he was her debtor instead of she his. In other words, up to the time of his death, and from the time he started to do for himself, his life had been worth nothing to her. For years he boarded with her, receiving clothing from her, and at one time a present of $30. It does not appear that his earnings or his labor ever made good to her the value of her expenses in his behalf; so that, judging the future by the past, his life was one which would have been of but little value to her, and in such a question as this the past is the main light which illumines the future. The enigma of the future of a life is not to be solved by the mere matter of faith and hope, or even by the natural possibilities of accomplishment, but mainly and chiefly by the experiences of the past, and what the life has already been. The law runs little along the lines of sympathy and affection, but

rather along the lines of the actual and the probable. Tested by the past, the future of this young man's life promised little to his mother.

Again, it appears from her testimony that she was the owner of four houses and twenty-one lots in the city of Chicago. The value of this property is not clearly disclosed, but the rent she received from the houses she leased was about $50 a month, and the taxes on the property she owned are at present $300 a year, and had been at one time shortly after the Chicago fire as high as $1000 a year. Such a tax implies no small value to the property. It also further appears that neither she nor her unmarried daughter, who with the deceased comprised the entire family, was engaged in any labor or business, but lived off from the property they owned; and also that the sum total of the deceased's property was about two months' wages due from the defendant. It is evident, comparing her means and his needs and earnings, that little of such earnings would go to her. The pecuniary value of his life to her must have been slight. The district court properly held that an award of $10,000 is excessive. We not only think that its ruling is not apparently erroneous, but that it is evidently correct. Counsel in their brief ask this court to name the amount which would not be considered excessive, providing it arrives at the conclusion that the present award is excessive. Such is not the function of this court; the amount which ought to be given, if any should be given, is to be ascertained by a jury. The sole function of the court is to see that the jury in making such award are not influenced by sympathy, feeling or prejudice, and do not go beyond what is fair compensation. We do not know what action we should take if both parties to this proceeding stipulated that this court might upon the testimony as it stands in the record determine what judgment should be entered. In the absence of some such stipulation, we simply inquire whether the district court erred, and in this case we do not think that it did, and therefore affirm its rulings.

Finally, in view of the manner in which this case comes before us, we do not feel warranted in attempting a review of other questions which in fact exist in the case. We do not think the practice of bringing a case to this court before final judgment is to be encouraged; and in view of the briefs of counsel and the stress laid upon this particular question (the amount of damages), we think it right to leave the decision right here. Upon the question of liability, upon the facts of the case, we may add that the case of the same plaintiff in error against Plunkett, 25 Kas. 188, is very nearly in point, and to that case we refer for any discussion of the principles controlling the liability of the defendant.

The judgment will be affirmed, and each party will pay the costs of its own proceedings in error.

HORTON, C. J.—I concur in the affirmance of the judgment of the district court, but do not assent to all of the language of the opinion. I think the railroad company waived any error (if any existed) in the ruling of the court in refusing judgment upon the findings of fact of the jury, by asking and obtaining a new trial.

VALENTINE, J.—I concur in the judgment of this court affirming the judgment of the court below, but I do not concur in the opinion delivered by my brother Brewer. There are several things contained in the opinion in which I do not concur; but I wish to mention only one of them particularly. Brother Brewer seems to found his decision of the first question involved in the case upon the decision made in the case of Burton *v.* Boyd, 7 Kas. 17. Now I do not think that that case is any authority for the present case. It is true, the first paragraph of the syllabus in that case seems to be nearly applicable to the present case; but still, the facts of the two cases are so unlike that the decision in that case cannot be any authority for the decision in this case. In that case, a verdict was rendered against Burton, and he immediately moved for a new trial, and his motion was sustained. In the present case, certain special findings of fact were made, probably in favor of the railroad company, and the railroad company immediately moved for judgment on the verdict, and the motion was overruled; and it is this ruling of which the railroad company now complains.

The first paragraph of the syllabus in the Burton case reads as follows:

"A party against whom no judgment has been rendered or final order made, and who after the trial in the court below, moved for and obtained an order granting him a new trial, has no good reason to complain in this court of the action of the court below."

Now to make this syllabus applicable to the present case, a very important fact, and the principal fact in this case, must be inserted, making the syllabus read as follows:

"A party against whom no judgment has been rendered or final order made, and who, after the trial in the court below [and after certain special findings of fact have been made, probably in his favor, moved for judgment in his own favor upon such verdict, and the court below overruled the motion, and then afterwards] moved for and obtained an order granting him a new trial, has no good reason to complain in this court of the action of the court below."

All the above words in brackets belong to this case, but do not belong to the Burton case. The Burton case was brought to the supreme court for the purpose of reversing a judgment rendered against Burton's co-defendant in the district court, John Shoemaker; while this case is brought by the railroad company to this court for the purpose of reversing the order of the district court

overruling the railroad company's motion for a judgment upon the verdict of the jury. It will therefore be seen that the Burton case is no authority in this case. The decision in the Burton case is unquestionably correct; but whether a similar decision rendered in the present case can be said to be correct, is doubtful. The decision in the present case goes a long way beyond that made in the Burton case. I think, however, the decision in the present case is correct. There is no statute authorizing the railroad company to bring the case to this court, unless it is the third subdivision of § 542 of the Code. That subdivision, with what precedes it, provides that "an order that involves the merits of an action, or some part thereof," may be brought to the supreme court on petition in error. My construction of that clause is that the order mentioned therein is one that involves the merits of an action, or some part thereof, by way of adjudication, and that it is not an order that leaves the merits of the whole action and every part thereof still to be adjudicated and determined. There may be some doubt as to whether this is the correct interpretation of that clause, but still I think it is, and hereafter I think that such must be held to be the correct interpretation. This is the first time, in my opinion, that the question has ever been decided by this court; or, to speak more correctly, this is the first time that it has ever been held by this court that a party moving for a judgment upon a verdict cannot bring petition in error directly to this court from the order of the district court overruling such motion.

See Thirteenth, etc., R. R. Co. v. Boudron, 2 Am. & Eng. R. R. Cas. 30; Porter v. Hannibal, etc., R. R. Co. id. 44; Kelly v. Chicago, etc., R. R. Co., id. 65; Berg v. Chicago, etc., R. R. Co., id. 70; Chicago, etc., R. R. Co. v. Sykes, id. 264; Wittman v. Milwaukee, etc., R. R. Co., id. 640.

The Pennsylvania Coal Co.

v.

Kate Conlan.

(101 *Illinois Reports*, 93. *November* 10, 1881.)

Testimony showing how far a train of cars ran after striking a person, is competent evidence in a suit against the railroad company to recover damages for causing the death of the person struck, as tending to show the train was running at a greater speed than allowed by ordinance of the city in which the accident occurred, and also that the train was not under proper control.

In a suit against a railroad company to recover for the killing of a person through negligence, while engaged in his duty as a switchman, the nature of his employment at the time of the injury is material on the question whether he was exercising due care.

In a suit against a railroad company to recover damages for striking a person by a train of cars through negligence, a witness had been speaking of

the train that struck the deceased. He was then asked, "State to the jury, in your opinion, how fast the train was going," which was claimed to be objectionable, as not being limited in time or to the particular train: *Held*, that the objection was not tenable.

Where a copy of the rules of a railway company, showing what was required of switchmen and other servants, was admitted in evidence, and where what work the deceased switchman was required to do, as well as the means at his hand with which it could be accomplished, was distinctly shown, and where the main and side-tracks, and their distance from each other, and the street crossings and yards, with all the other facts deemed necessary, were given in evidence, it was *held* no error to refuse the testimony of other switchmen, to show that in their opinion it was not necessary for the deceased to have been where he was when he received the injury, or to have passed along the track, and that there was space enough to properly perform his duties without going upon such track, etc., as the jury were as competent, from the facts shown, as the witnesses, to form an opinion on the questions proposed.

As to matters which do not so far partake of the nature of a science as to require a course of previous habit or study in order to an attainment of a knowledge of them, the opinions of witnesses, though experts, are not admissible.

The question of negligence is not one of law, but of fact, and must be proved like any other. Hence an instruction is properly refused which tells the jury, as a matter of law, that certain facts per se constitute negligence. By this it is not meant that the definition of negligence is one of fact, to be determined by the jury.

Expressions may be found under the old practice, when this court was required to review questions of fact as well as of law, that certain facts were evidence of negligence. But such expressions are mere arguments—the expression of a conclusion of fact, and not of law.

As a party is not bound to prove matters which are merely surplusage, if the proof does not correspond with such matters alleged the variance is immaterial.

In an action against a railroad company to recover for an injury by striking the deceased with a moving train of cars, the declaration alleged that the deceased, at the time, was engaged in his duty in passing over and upon a certain track, "to give directions to others of his co-servants, and to aid in the switching, movement and operation of certain cars being switched upon" such track. There was evidence tending to prove this allegation: *Held*, that proof that deceased had another duty to perform, as taking the number of the cars in a memorandum book, constituted no variance, as what the deceased was doing at the time was no part of the tort complained of, or of the means adopted in effecting it.

In such case the gist of the action is the defendant's negligence, as alleged, and the motives of the deceased in being upon the track, or why he was there, are wholly immaterial, it being sufficient that he was lawfully there. Any allegation showing why the deceased, as switchman, was upon the track, except that he was rightfully there, is surplusage.

A motion to exclude all of the plaintiff's evidence at its close, being in the nature of a demurrer to the evidence, is properly refused if there is any evidence tending to prove the plaintiff's case.*

* DEMURRER TO EVIDENCE. As to the proper office of a demurrer to evidence, what it should contain, and what it admits, Crowe v. The People, 98 Ill. 231; Valtez v. Ohio and Mississippi Ry. Co., 85 id. 500; Phillips v. Dickerson, id. 11.

On the general subject of an involuntary non-suit, or excluding all the plain-

The court, on overruling a defendant's motion to exclude all the plaintiff's evidence, as not making a case, remarked that he would not give his reason for so deciding, for the counsel did not want him to sum up the testimony and tell the jury why he overruled the motion; *held*, that there was no error in such remarks.*

It is the office of the judge to instruct the jury in points of law, and of the jury to decide on matters of fact.

An instruction is properly refused which singles out an isolated fact, saying that it alone does not constitute wilful or wanton negligence, especially when the question does not hinge on such fact alone, and the instruction does not assume to be predicated upon the evidence.

An instruction telling the jury, as a matter of law, that an ordinary switchman's lantern, giving forth a white light, is a sufficient compliance with a city ordinance requiring "a brilliant and conspicuous light on the forward end of each locomotive," etc., is properly refused, as taking from the jury an important fact which it is their province to find from the evidence.

To impeach a witness it must be shown that he wilfully and knowingly testified falsely to a material fact, and even then the jury are not compelled to disbelieve him as to other matters. They may do so, but should be left to exercise their judgment in that regard.

Where no objection is made that the damages are excessive, in the trial court in the motion for a new trial, nor in the Appellate Court, that question is not before this court.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook County; the Hon. JOSEPH E. GARY, Judge, presiding.

This was an action on the case, brought by appellee against appellant, in the Superior Court of Cook County, in consequence of the negligence of appellant resulting in the death of her intestate.

The declaration contains four counts: In the first, the negligent act is alleged to have consisted in wrongfully, unlawfully and negligently driving a locomotive engine and train of cars, within the limits of the city of Chicago, without having a brilliant and conspicuous light on the forward end of said train, as required by an ordinance of said city. In the second, the negligent act is alleged to have consisted in wrongfully, negligently, etc., driving the said locomotive engine and train at a greater rate of speed, within the limits of the city of Chicago, than six miles per hour, contrary to an ordinance of said city. In the third, the negligent act is alleged to have consisted in driving the said locomotive engine and train of cars at a high rate of speed, neglecting to ring a bell on the said

tiff's evidence from the jury, or instructing the jury to find for the plaintiff, or for the defendant. Holmes *v.* Chicago and Alton R. R. Co., 94 Ill. 440, and cases cited in note; Caveny *v.* Weiller, 90 id. 158; Hubner *v.* Feige, id. 209, and note; Crowley *v.* Crowley, 80 id. 469; Smith *v.* Gillett, 50 id. 291.

* Practice—remarks of the judge in making his rulings—whether ground of error. Ashbaugh *v.* Murphy et al., 90 Ill. 182; Beasley *v.* The People, 89 id. 571: Skelly *v.* Boland, 78 id. 488; Andreas et al. *v.* Ketcham, 77 id. 377; Farnham *v.* Farnham, 73 id. 498.

As to improper remarks of council. Hennies et al. *v.* Vogel, 87 Ill. 242; Kepperly *v.* Ramsden, 83 id. 354; Wilson *v.* The People, 94 id. 299.

locomotive, contrary to law and the ordinance of said city. In the fourth, the negligent act is alleged to have consisted in carelessly, negligently, etc., driving and managing the said locomotive engine and train, etc.

It was proved on the trial, that at the time the intestate was injured, appellant and the Chicago and Alton R. R. Co. operated certain tracks in the city of Chicago, in common. The intestate was a switchman in the employ of the Chicago and Alton R. R. Co., and about half past seven o'clock on the evening of February 13, 1880, and while the intestate, together with another switchman and an engineer and fireman, were in charge of a switch-engine, gathering up empty cars from off the switches, the intestate was struck by one of appellant's freight trains, backing up along one of its main tracks, and thereby received the injuries from which he subsequently died.

Ordinances of the city of Chicago were also read in evidence upon the trial, providing that "every locomotive engine, railroad car or train of cars running in the night time on any railroad track in said city, shall have and keep, while so running, a brilliant and conspicuous light on the forward end of such locomotive engine, car, or train of cars;" also, that "no locomotive engine, railroad passenger car or freight car shall be driven, propelled or run upon or along any railroad track within said city at a greater rate of speed than six miles per hour;" and also, that the bell "of each locomotive engine shall be rung continuously while running within said city." The only light on the advancing or forward end of the train, was a common brakeman's lantern.

The other facts, so far as they may be material to an understanding of this case, will sufficiently appear in the opinion.

The jury found the appellant guilty, and assessed appellee's damages at $5000. Motion for a new trial was made, and overruled by the Superior Court, and judgment rendered upon the verdict, and thereupon appellant appealed to the Appellate Court for the First District, and that court, on final hearing, affirmed the judgment of the Superior Court. The present appeal is prosecuted from that judgment.

The errors assigned are:

First—The Appellate Court erred in not sustaining the points, and each of the points, assigned for error on appeal from said Superior Court.

Second—The said Appellate Court erred in not reversing the judgment of said Superior Court.

Third—The said Appellate Court erred in affirming the judgment of the said Superior Court.

Messrs. Willard & Driggs, for the appellant:

What the deceased was doing at the time of the alleged injury was material, and must be proved as alleged, although set forth

with unnecessary particularity. City of Bloomington *v.* Goodrich, 88 Ill. 558; Goodhue *v.* People, 94 id. 37; Chicago and Alton R. R. Co. *v.* Michie, 83 id. 427; Toledo, Wabash and Western R. R. Co. *v.* Beggs, 85 id. 80.

The court erred in refusing to allow the witnesses Morrisey and Rose, experienced switchmen, to testify as to their opinions, etc. Linn *v.* Sigsbee, 67 Ill. 75; Carter *v.* Bœhm, 1 Smith's Leading Cases, 286; 1 Redfield on Railways, 579; Beckwith *v.* Sydebotham, 1 Camp. 116; Belfontain and Indiana R. R. Co. *v.* Bailey, 11 Ohio St. 333; Cincinnati and Zanesville R. R. Co. *v.* Smith, 22 id. 227; Transportation Line *v.* Hope, 5 Otto, 297; 1 Wharton on Evidence, sec. 444.

Persons not experts may give their opinions as to the value of property. Butler *v.* Wehrling, 15 Ill. 488; McKee *v.* Nelson, 4 Cow. 350; Steamboat Clipper *v.* Logan, 18 Ohio, 396.

The court erred in overruling appellant's motion to exclude appellee's testimony. Such motions are in the nature of a demurrer to evidence, and should be sustained when the plaintiff's proof does not make out a case. Fent et al. *v.* Toledo, Peoria and Warsaw R. R. Co., 59 Ill. 349; Poleman *v.* Johnson, 84 id. 269; Phillips *v.* Dickerson, 85 id. 11.

The deceased could have stood between the two main tracks and performed the service in which he was engaged. He did not do so, but, on the contrary, placed himself in the most dangerous position possible under the circumstances, and the conclusion is irresistible that the proximate cause of his death was his own want of care. Chicago, Burlington and Quincy R. R. Co. *v.* Hazard, 26 Ill. 373; Chicago and Northwestern Ry. Co. *v.* Sweeney, 52 id. 325; Chicago and Northwestern Ry. Co. *v.* Donohue, 75 id. 255; Chicago and Northwestern Ry. Co. *v.* Scates, 90 id. 586; Lake Shore and Michigan Southern Ry. Co. *v.* Clemens, 5 Bradw. 77.

That defendant's instructions numbers one and two were proper and correct, counsel cited Bartlett et al. *v.* Board of Education, etc. 59 Ill. 364; Kendall *v.* Brown, 74 id. 232; Clevinger *v.* Dunaway, 84 id. 367.

That instruction number seven should have been given, see Illinois Central R. R. Co. *v.* Hetherington, 83 Ill. 510; Chicago, Burlington and Quincy R. R. Co. *v.* Harwood, 90 id. 425. The court erred in giving the instruction on its own motion.

Messrs. Monroe & Leddy, for the appellee:

The court did allow appellant to prove what the duties of Conlan were, and how they were usually performed, as well as all the facts relating to the case, but not what Conlan might have done.

On the question whether the plaintiff used due care, or acted imprudently, it is error to admit in evidence the opinions of witnesses engaged in the same business, when no question of science, trade or skill is involved. Hopkins *v.* Indianapolis and St. Louis

R. R. Co., 78 Ill. 32; City of Chicago *v.* McGiven, id. 347; Chicago and Alton R. R. Co. *v.* Springfield and Northwestern R. R. Co., 67 id. 142.

The court did allow appellee and appellant both to show fully the duties of Conlan, the situation of the ground, tracks, switches, trains, and the circumstances and conditions under which he performed those duties, and left it for the jury to say whether or not Conlan was negligent.

The first and second instructions were properly refused, as they took the question of negligence away from the jury, and left it with the court to say that the deceased, under a certain state of facts, was guilty of negligence. The question of the negligence of the deceased was embodied in the instructions given by the court, and fairly submitted to the jury. The case of Bartlett *v.* Board of Education, etc., 59 Ill. 364, cited by appellant, has no application.

Instructions numbers seven and eight, refused, were properly refused, the first leaving out the comparative negligence, and also being an abstract proposition of law, and the eighth infringing on the province of the jury.

The twelfth instruction was properly refused, as it was faulty in using the word "should" instead of the word "may," and omitting other words, "wilfully and knowingly." Reynolds *v.* Greenbaum, 80 Ill. 416; Pollard *v.* The People, 69 id. 148.

Mr. Justice Scholfield delivered the opinion of the court:

Numerous objections are urged in argument against the rulings below, and they shall be noticed in the order in which they are discussed in appellant's brief.

First—Certain evidence, admitted over appellant's objections, it is insisted, was erroneously admitted.

1. A witness testified how far appellant's train ran after Conlan was struck This, we think, was competent. An ordinance of the city limited the speed of trains to six miles an hour. It was not indispensable, in proving a violation of this ordinance, that the proof should show the speed was ascertained by actual comparison and measurement with a timepiece. That, of course, would be the very best kind of evidence, but from the nature of things it is absolutely necessary that a lower grade of evidence should be admissible. This evidence would tend to prove the speed of the train, and also whether it was under proper control, and was, in our opinion, legitimate, under the issues.

2. Again, the same witness gave answer, fixing the speed of the train, to this interrogatory: "State to the jury, in your opinion, how fast the train was going." The only respect wherein it is claimed this is objectionable is, that it is not limited in time. The objection results from a misapprehension. The witness had been previously speaking of the train that struck Conlan. The question

is limited to that train, and, we think, must clearly have been so understood by the witness and the jury, and so was free of the objection.

3. The same witness also identified a certain memorandum book as the one Conlan was using in taking the numbers of the cars at the time he was injured. The objection urged against this evidence is, it is not alleged in the declaration that the taking of the numbers of cars was the duty of Conlan, as a switchman, and counsel say: "The allegation in each of the counts is, that it became, and was, necessary for the deceased to pass over and upon said easternmost track, 'to give directions to others of his said co-servants, and to aid and assist in the switching, movement, and operation of certain cars then being switched upon the westernmost track.'" And they cite City of Bloomington *v.* Goodrich, 88 Ill. 558; Goodhue *v.* People, 94 id. 37; Chicago and Alton R. R. Co. *v.* Michie, Admx., 83 id. 427; Toledo, Wabash and Western R. R. Co. *v.* Beggs, 85 id. 80, as sustaining the proposition that what the deceased was doing at the time was material, and must be proved, as alleged. Counsel are in error as to the effect of what is ruled in those cases. They announce, in substance, that if the pleader, though needlessly, describe the tort, and the means adopted in effecting it, with minuteness and particularity, and the proofs substantially vary from the statement, there will be a fatal variance—and this was but following an old and well settled rule of common law pleading. 1 Chitty's Pleading (7th Am. ed.), 427. But what deceased was doing at the time he received the injury is no part of the tort, or of the means adopted in effecting it. And although it is alleged, in the language quoted above, there is proof tending to sustain this allegation—that is to say, that it became, and was, necessary for the deceased to pass over and upon said easternmost track, to give directions to others of his said co-servants, and to aid and assist in the switching, movement, and operation of certain cars then being switched, etc.—it would be difficult to determine, upon any well-established principle of law, that the fact that the deceased had an additional motive for being on the track, viz.: taking the numbers of cars, would constitute a variance between the proofs and allegations.

There is, however, in our opinion, a still more complete and satisfactory answer to the objection. "A party is not bound to prove matters which are merely surplusage. If the proof does not correspond with such matters, the variance is not material." West *v.* Cole, 12 Mod. 127; Gibbs *v.* Cannon, 9 S. & R. 203; Little *v.* Blint, 16 Pick. 365; 3 Robinson's Practice, 562; 1 Chitty's Pleading (7th Am. ed.), 262, 263.

It is distinctly averred in the declaration that the deceased was a switchman in the employ of the Chicago and Alton R. R. Co., and that in the discharge of his duties as such it became, and was,

necessary to pass upon and over the track of the appellant, and that while he, in the discharge of such duty, with due care and caution, and without negligence on his part, was so passing over and along said track, etc., appellant wrongfully, negligently, etc., drove its engine and train without having a sufficient headlight, as prescribed by ordinance of the city, etc., and thereby struck and ran against and upon the deceased, thereby wounding him, etc.

The gist of the action is appellant's negligence. The motives of the deceased in being upon the track are wholly immaterial, it being sufficient that he was lawfully there. Obviously no issue could be formed on the question of deceased's motives. Hence, all that is alleged in regard to why the deceased was upon the track might have been stricken out without affecting the sufficiency of the declaration. It was what appellant did, not why deceased was there, that was important to be inquired into. The allegation was entirely surplusage, and might have been disregarded, in whole or in part, without affecting the merits of the case, and it is therefore unimportant whether it was proved or not.

Second.—Evidence was offered by appellant which, on objection by appellee, was rejected by the court, consisting of the testimony of several switchmen, to show that in their opinion it was not necessary to be where deceased was when he received his fatal injury; that in order to perform the duties enumerated in the declaration it was not necessary for the deceased to pass along upon the east main track; that there was space enough to properly perform such duties without going on said track, and that there was no rule of the Chicago and Alton R. R. Co. requiring the switchman performing the duties before indicated to stand on the main track. The form of the proposition is repeated under varied phraseology, but it all amounts simply to a proposition to establish that the deceased did not exercise due care, in the opinion of the witnesses, or to give the opinions of other switchmen on that subject. What the rules of the Chicago and Alton R. R. Co. required of switchmen and other servants was proven by a copy of those rules; and what work the deceased had to do was distinctly pointed out, as well as the means at his hand with which it could be accomplished. The main tracks and side-tracks, distances from each other, street crossings and yards were fully described, and all the other facts deemed necessary by the respective counsel to place the case fully and fairly before the jury, were given in evidence. Under these circumstances we cannot perceive why every man on the jury was not as competent to give his opinion on the questions proposed to be proved as a professional switchman—whether to be on a track is dangerous, whether there is room to pass by the side of a train without getting on an adjoining track, how far tracks are from each other, how far cars project over the sides of tracks, how far, at any given point, it is necessary for a person to stand from a

track in order to see the front or rear of trains, and all kindred questions, are, most obviously, as easily ascertained and testified to by one man as by another of equal intelligence, without regard to experience in railroading.

In Linn v. Sigsbee, 67 Ill. 75, referred to by counsel for appellant, this court held that in an action for the breach of a contract made by one physician with another not to practise medicine within a given territory, other physicians could not be allowed to give their opinions as experts as to the amount of damages resulting to the plaintiff by the resumption of practice by the defendant. The court, among other things, said: "If they" (the physicians) "did not have a knowledge of the facts, the sickness, and the practice performed by the defendant, an opinion was a mere guess; if they had such knowledge from a detailed statement of the facts, the jury could have assessed the damages;" and this would seem to have equal pertinency here. If the switchmen did not know all the facts essential to an intelligent opinion, any opinion they might express would be a mere guess. If they did know the facts, they could detail them to the jury, so that the jury could form their own opinion.

The quotation made in that case from Carter v. Bœhm, 1 Smith's Leading Cases, 286, we do not think applicable here, because the subject matter of inquiry is not such that only persons of skill and experience in it are capable of forming a correct judgment upon it,—or, in other words, it does not so far partake of the nature of a science as to require a course of previous habit or study in order to the attainment of a knowledge of it. And this precise question has been thus decided by us in Hopkins v. Ind. and St. L. R. R. Co., 78 Ill. 32. To a like purport are also City of Chicago v. McGiven; 78 Ill. 347, and Chicago and Alton R. R. Co. et al. v. Springfield and Northwestern R. R. Co., 67 Ill. 142. Questions of value, as in Butler v. Mehrling, 15 Ill. 488, which are compounded of fact and opinion, are not analogous.

The questions whether deceased had been in employment long enough to know about this train, and whether his employment had been such that he saw or might have seen this train every evening, which were asked, and their answers disallowed by the court, belong to the same class as those we have commented upon, and require no further remarks. See Wharton on Evidence, vol. 1, sec. 436.

Third—Appellant's counsel, at the close of appellee's testimony, moved to exclude it from the jury, but the court refused to allow the motion.

Counsel insist that such motions are in the nature of demurrers to evidence, and should be sustained where the plaintiff's proof does not make out a case, and they cite Fent et al. v. Toledo, Peoria and Warsaw Ry. Co., 59 Ill. 349; Poleman v. Johnson, 84

id. 269; Phillips v. Dickerson, 85 id. 11, sustaining the proposition. Counsel are mistaken in the limitations of the rule recognized by these cases. The motion, it is true, is in the nature of a demurrer to evidence; but, as a demurrer to evidence, it was never heard that a judge could take the question of fact from the jury, and interpose his own judgment as to the weight and preponderance of evidence in the place of theirs. The rule, on the contrary, is, as is shown by these cases, the demurrer admits not only all that the plaintiff's testimony has proved, but all that it tends to prove,—and hence, if there is evidence tending to prove the issues in favor of the plaintiff, the judgment must be in his favor. There was evidence here tending to prove the issues in favor of appellee, and the court very properly, therefore, overruled the motion.

Fourth—The court refused certain instructions asked by appellant, of which the first, second, seventh, eighth, twelfth, thirteenth and fourteenth are specifically pointed out in argument as having been erroneously refused. The others were practically abandoned on argument, and no notice, therefore, need be taken of them.

As to the first and second, it is enough to say the court properly refused them, because they assumed to tell the jury, as matters of law, that certain facts per se constituted negligence on the part of the deceased. In Great Western R. R. Co. v. Haworth et al., 39 Ill. 353, this court ruled, "negligence is not a legal question, but is one of fact, and must be proved like any other," and this was followed in Chicago and Alton R. R. Co. v. Pennell, 94 Ill. 448. Of course this does not mean that the definition of negligence is one of fact, and that the jury shall be left to their own fancies to determine what, in each case, shall be the measure to which the proof shall be applied in determining whether there is negligence, but, simply, the general rule being declared as matter of law, the jury must determine whether such facts have been proved as bring the case within that general rule. Thus, in the Haworth case, supra, negligence was defined to be "the opposite of care and prudence—the omission to use the means reasonably necessary to avoid injury to others," and it was left to the jury to determine, from all the evidence, whether the party charged with the negligent act was thus guilty—that is, whether the party had failed to exercise care and prudence, or, in other words, omitted to use the means reasonably necessary to avoid injury to the other party. It is sometimes said that negligence is a mingled question of law and fact. Shearman and Redfield on Negligence (2d ed.), sec. 11. If by this it is meant it is a question of law to determine the rule—that is, the definition of negligence, and a question of fact to determine, from the evidence, whether the particular case falls within the rule or definition,—it is entirely in harmony with the rulings of this court in the cases supra.

Expressions may frequently be found in opinions of this court,

where, under our old Practice act, we were required to review questions of fact as well as of law, that such and such facts were evidence of negligence. But this is always mere argument—the expression of a conclusion of fact, not of law,—from certain other omitted or proved facts. In such cases, and as to such questions, the court is exercising precisely the same function as does a jury in the trial court, only, unlike the jury, giving its reasons for its conclusions; and it is this blending, in such cases, of the distinct and independent functions exercised by court and jury at nisi prius, that has occasionally misled counsel, and induced the belief that the court has declared the result of purely controverted questions of fact as conclusions of law. "It is the office of the judge to instruct the jury in points of law,—of the jury to decide on matters of fact." Broom's Maxims (4th ed.), 103, 77.*

The seventh instruction is faulty in singling out a single fact and saying that it, alone, does not constitute wilful or wanton negligence. No one, perhaps, claims that it does. But the case did not hinge on that isolated fact, and to single it out and give it this undue prominence could have but tended to mislead the jury. Besides, it does not assume to be predicated upon the evidence, and if it did, it would be but the expression of an opinion of fact, and not of law. Whether such running would constitute wilful or wanton negligence, would depend entirely upon the attending circumstances, all of which should be taken into consideration in order to give an intelligent answer to a question of that character.

The eighth instruction told the jury, as matter of law, in substance, that an ordinary switchman's lantern, giving forth a white light, was a sufficient compliance with the city ordinance requiring "a brilliant and conspicuous light on the forward end of each locomotive," etc. The instruction does not purport to give a legal construction of the ordinance. It simply takes from the jury a question of fact. The law said there "must be a brilliant and conspicuous light," etc., no matter how produced, and it is merely a question of fact whether there was such a light. The court, therefore, properly refused the instruction.

The twelfth instruction was properly refused. The jury are not compelled to disbelieve a witness merely because his testimony as to some material point in the case may not be true. To impeach him it must be shown that he wilfully and knowingly testified falsely, and even then the jury are not compelled to disbelieve him as to other matters. They may do so, but should exercise their judgment in that regard. Reynolds *v.* Greenbaum, 80 Ill. 416; Pollard *v.* The People, 69 id. 148.

*See Clark *v.* Boston, etc., R. R. Co., 1 Am. and Eng. R. R. Cas. 134; Hanlon *v.* South Boston R. R. Co., 2 Am. and Eng. R. R. Cas. 18; Bell *v.* Hannibal, etc., R. R. Co., 4 Am. and Eng. R. R. Cas. 580.

The substance of the thirteenth instruction is clearly and distinctly embodied in the instructions given by the court, and so its refusal could have done no harm.

The fourteenth instruction was also properly refused. The nature of the employment of deceased at the time he was injured, was material on the question of whether he was exercising due care, and the purport of the instruction was to assert the contrary. The court gave to the jury a charge, of its own motion, embodying with substantial accuracy all the principles of the law we think essential to a full comprehension of their duties, by the jury.

The objections urged are, in our opinion, hypercritical, for the most part, and all untenable. They are not of sufficient practical importance, in our opinion, to justify stating and answering them seriatim or at length, and we shall therefore forbear further comment.

An objection is made to a remark of the judge in overruling appellant's motion to exclude appellee's testimony, to the effect that he would not give his reasons for deciding as he did, for the counsel did not want him to sum up the testimony and tell the jury why he overruled the motion. It is impossible to conceive that this improperly affected the jury. The motion was overruled, and from this the jury must have inferred it was not well founded, and we are unable to perceive that anything more prejudicial to appellant could have been inferred from these remarks of the judge. We regard the objection as frivolous.

There seems to have been an objection urged in the Superior Court in regard to the competency of a juryman, but since it is not pressed in argument here, we infer it has been abandoned, and, we think, very properly so, as it was plainly destitute of merit.

The question of whether the damages are to be regarded as excessive, is not before us, since that objection was not raised in the motion for a new trial in the Superior Court, nor assigned for error in the Appellate Court. Emory *v.* Addis, 71 Ill. 273; Thayer *v.* Peck, 93 id. 357; Diversey *v.* Johnson, Admx., id. 547; Page et al. *v.* People ex rel., 99 id. 418; Litchtenstadt *v.* Rose, 98 id. 643.

The judgment is affirmed.

Judgment affirmed.

MISSOURI, ETC., R. R. Co.

v.

LONG.

(*Advance Case, Kansas. June Term*, 1882.)

1. Sec. 2 of Ch. 81, Laws of 1869 (Sec. 38, Ch. 84, Comp. Laws 1879), is a nullity, being in violation of Sec. 16, Art. 2 of the Constitution of the State.
2. Sec. 47 of Ch. 23, Gen. Stats. 1868 (Sub-division 4 of Sec. 47, Ch. 23,

Comp. Laws 1869), devolves upon railroad companies the duty whenever they cross a highway to restore it to its former state, or to such a state as not to have necessarily impaired its usefulness, but no duty is imposed thereby upon the companies to keep the highway in repair. When the highway has been fully restored to its former condition, the railroad company is under no obligation thereafter under said section to maintain a sufficient and safe crossing.

3. A way generally travelled by the public for more than fifteen years as a public road, but not regularly laid out under the provisions of any statute, or of public record as a highway or street by dedication, is not within the terms of Sec. 1, Ch. 105, Laws of 1876.

4. Sec. 1, Ch. 105, Laws of 1876 (Sec. 41, Ch. 84, Comp. Laws 1879) provides it shall be the duty of each and every railway company or corporation owning, controlling or operating any line of railroad within this State to construct and keep in repair at each crossing of "any regularly laid out public highway" a good and substantial crossing.

Held, that the words "any regularly laid out public highway" do not apply to roads which have become such by use merely.

DAVID KELSO and W. A. Johnston, attorneys for plaintiffs in error.

E. B. Peyton and Almerin Gillett, for defendant in error.

On the 17th day of May, 1881, Mariana Long brought her action against the Missouri, Kansas and Texas Ry. Co. in the District Court of Coffey County to recover for personal injuries. The petition, omitting court and title, was as follows:

"The plaintiff states that at the time hereinafter mentioned the defendant was a corporation duly incorporated under and by virtue of the laws of the State of Kansas, and owned and operated a certain railroad known as the Missouri, Kansas and Texas Ry., together with the tracks, cars, locomotives, and other appurtenances thereto belonging; that said railroad was and is constructed and operated through the city of Burlington, in Coffey County, Kansas; that at the time of the injuries hereinafter complained of, and for a long time prior thereto, and long before said railroad was constructed and operated through the said city of Burlington, there was and still is a public travelled highway leading from said city west to North Big Creek, or Verdigris Falls, and was and is commonly known and designated as the "Eureka Road;" that said public road was and is a road of common and general travel by the public, and had existed and had been so used and travelled continuously by the public as a highway for more than twenty-one years prior to the happening of the injuries hereinafter stated.

"That the said defendant constructed and operated its said railroad over and across said public road in said city of Burlington aforesaid; that said defendant wholly failed, neglected and refused to construct good and sufficient and safe crossing at the point where said railroad crosses said public highway, and for more than ten years last past said defendant has wholly neglected and refused to construct a good, sufficient and safe crossing whatever at the point

where said railroad crosses said public road as aforesaid, although often requested so to do.

"That on the 17th day of July, 1880, said plaintiff was travelling upon said public road in a wagon drawn by two horses; that it became necessary for her to cross said railroad track where it crossed said public road aforesaid; that while in the act of crossing said railroad track, and without any fault or negligence on the part of this plaintiff, said wagon was by reason of the negligent, insufficient and unsafe condition of said crossing, overset, and this plaintiff was thereby thrown a great distance and with great force to the ground, thereby dislocating the womb of said plaintiff, and otherwise greatly bruised and injured her.

"That by reason thereof plaintiff became and was for a long time sick; was obliged to and actually expended about the sum of one hundred and fifty dollars for surgical and other treatment and attendance in attempting to cure herself, and was and is compelled to wear a womb supporter; has become incapacitated and prevented for life from actively pursuing her business and otherwise injured to her damage in all in the sum of $10,000.

"Wherefore plaintiff prays judgment against the defendant for the sum of ten thousand dollars and for cost."

On the 31st day of May following the defendant filed its answer to the petition, which was in words and figures following:

"And now comes the said Missouri, Kansas and Texas Ry. Co., defendant by W. A. Johnston, its attorney, and for its answer to the petition of said Mariana Long, plaintiff, and says that the said plaintiff ought not to have or maintain her said action herein against this defendant because it denies each and every allegation therein set forth.

"And for further and second answer to the petition of the said plaintiff the defendant says she ought not to have or maintain her said action therein because that at the place where the alleged injuries were said to occur is not at a public crossing of said railway; that no public highway crosses said railway at the place where plaintiff alleges that her wagon was upset; that it was at a point on said railway that was never laid out as a public highway, and at a point where said railway company was not required to put in a safe and convenient crossing, nor any crossing whatever; that said railway has been built for more than twelve years and has never been required to put in any crossing whatever at said place where the pretended injuries are said to have been inflicted.

"And for a third and further answer to the petition of the said plaintiff the defendant says: She ought not to have nor maintain her said action herein because the said Mariana Long, plaintiff, was herself guilty of carelessness and negligence directly contributing to her own injuries, and having fully answered, the defendant asks to be hence discharged with its costs."

Afterwards, on the 4th day of June following, the plaintiff filed her reply as follows:

"Comes now the above named plaintiff by her attorneys, Almerin Gillett and Peyton & Peyton, and for a reply to the second and third defences in defendant's answer denies each and every allegation therein contained."

The case was tried at the July term of the district court for the year 1881 to the court with a jury. The jury returned a verdict for the plaintiff, and assessed her damages at the sum of $3000. Defendant filed a motion for a new trial, which upon hearing was overruled and judgment was entered upon the verdict for plaintiff. The defendant brings the case here.

The opinion of the court was delivered by HORTON, C. J.

After this case was called for trial and a jury had been impanelled and sworn, upon the attempt on the part of defendant in error (plaintiff below) to introduce her evidence, the plaintiff in error (defendant below) objected to any evidence being offered for the reason that the petition did not state facts sufficient to constitute a cause of action against the defendant. The objection was overruled by the court and this ruling is the first error assigned.

It is contended on the part of the company that railway companies in this State are only required to construct and keep in repair the crossings at regularly laid out public highways; that it appears from the petition the way travelled by Mrs. Long on or about July 17, 1880, was not a regularly laid out public highway—only a highway by use—therefore, that the company was not obliged to construct and keep in repair the crossing in the city of Burlington where the railroad crosses this way, and was not guilty of negligence in refusing or omitting so to do. There are three several statutes in this State concerning the duty of railway companies to construct crossings at all points where any railway crosses any highway. Sec. 46, Ch. 23, Gen. Stats. 1868 (Sec. 47, Ch. 23, Comp. Laws 1879), provides that: "Every railway corporation shall in addition to the powers hereinbefore conferred have power fourth, to construct its road across, along, or upon any stream of water, watercourse, street, highway, plank-road or turnpike which the route of its road shall intersect or touch. But the company shall restore the stream, watercourse, street, highway, plank-road or turnpike thus intersected or touched to its former state, or to such state as to have not necessarily impaired its usefulness. Nothing herein contained shall be construed to authorize the construction of any railway not already located in, upon or across any street in any city incorporate or town without the assent of the corporate authorities of such city."

Sec. 2, Ch. 81, Laws of 1869 (Sec. 38, Ch. 84, Comp. Laws 1879), provides:

"At any or all points where any railroad crosses any public high-

way, the railroad company owning said railroad shall, without unnecessary delay, construct good and sufficient and safe crossings."

Sec. 1, Ch. 105, Laws 1876 (Sec. 41, Ch. 84, Comp. Laws 1879), provides:

"It shall be the duty of each and every railway company or corporation owning, controlling or operating any line of railroad within this State, to construct and keep in repair at each crossing of any regularly laid out public highway a good and substantial crossing by securing on each side of each rail a board not less than twelve feet long and not less than ten inches wide and two inches thick, and shall fill the space between the two inside boards with gravel or broken stones, or shall floor the space with boards not less than two inches thick and twelve feet long."

We suppose that Sec. 2 of Ch. 81, Laws of 1869, may be wholly disregarded as invalid, being in violation of Sec. 16, Art. 2 of the Constitution of the State. The title of the bill, which is chapter 81, is as follows: "An act to require railroad companies to make cattle guards and to pay damages that individuals may sustain." Within the previous decisions of this court, Sec. 2 of Ch. 81 is a nullity. Swayze *v.* Britain, 17 Kas. 625; Commissioners of Sedgwick County *v.* Bailey, 13 Kas. 600; State *v.* Barrett, 27 Kas.

Therefore, the question reverts back whether under the act of 1868 or the act of 1876 the railway company was required to put in and maintain a road crossing at the place where Mrs. Long received her injuries. The duty imposed by the statute of 1868 upon the railroad corporation required the company to restore a legal highway crossed by it to its former state, or to such state as not to have necessarily have impaired its usefulness. But when the highway had been fully restored to such condition, the railway company was under no obligation to maintain thereafter a sufficient or safe crossing. Or, in other words, after a highway had been fully restored to its former state, if any highway existed either by statute, dedication or prescription, the corporation would be under no obligation to keep the same in repair. Railway Co. *v.* Maurer, 21 Ohio St. 421. But the petition can hardly be said to charge an omission of duty under the act of 1868. It is nowhere clearly alleged that the railway company where it crossed the alleged way failed to restore it to its former state when it originally constructed its road across such way. Certainly if at the time of constructing its road across the way at the place of the injury it had restored the highway to its former state, or to such a state as to have not necessarily impaired its usefulness, the fact that it subsequently became out of repair or defective would not have rendered the railway company liable under the statute for injuries resulting from such defects. No duty is imposed by this statute upon the company to keep the highway in repair. Again, however, according to the petition the way had not been used as a public highway for the period of fifteen

years at the time of the construction of the railroad over it, therefore, at such time the highway was not a public highway by use or prescription. The petition does not charge that the highway was established by dedication, and therefore, under the allegations of the petition, the railway company at the time of the construction of its road had the right to deny to the public the use of crossing over its road-bed, as the use of the way at the crossing by the public had not been sufficiently long for the public to have acquired the right of way for a public highway. A highway may be established by user, but such use and enjoyment must be continuous for such a period of time as would bar an action for the recovery of real estate by the statute of limitations, and must generally be so continued and uninterrupted with the knowledge, assent or acquiescence of the owner of the land. Such petition charges that the railway company constructed and commenced to operate its road about eleven years after the way was in use for general travel by the public, therefore, its use by the public before the construction of the railroad was not sufficiently long to constitute it as a highway by user. But as the petition alleges "that said public road was and is a road of common and general travel by the public, and had existed and been so used and travelled continuously by the public as a highway for more than twenty-one years prior to the happening of the injuries complained of," and therefore alleges that at the happening of said injuries the said way was and had been in the uninterrupted use of the public as a highway for such a period of time as would bar an action for the recovery of real estate by the statute of limitations, we are called upon to determine the question whether this road which had been travelled upon by the public for a period exceeding fifteen years is within the terms of Sec. 1, Ch. 105, Laws of 1876, requiring railroad companies to construct and keep in repair at each crossing of any regularly laid out public highway a good and substantial crossing. Is a way established by user a regularly laid out public highway? The first impressions of the writer upon the hearing of the argument in this case were that a way used by the public generally for a period of time as would bar an action for the recovery of real estate came within the statute. Further consideration, however, has brought our mind to a different conclusion. While the statute of 1868 requires railroad companies crossing any "highway, plank-road or turnpike" to restore it to its former state, it leaves the subsequent repairs of the highway, plank-road or turnpike to the highway officials. This we suppose upon the theory that as the property of the railway company is subject to the payment of taxes, road and otherwise, the same as the property of any individual in the road district, that it is but fair, after the highway so crossed by the railway is restored to its former condition, the company shall be under no more obligation to keep it thereafter in repair, than any individual in the district. Now the act of 1876

casts an additional burden upon railway companies. It requires of such companies to construct and keep in repair at each crossing of "any regularly laid out public highway" a good and substantial crossing by securing on each side of each rail a board not less than twelve feet long and not less than ten inches wide and two inches thick, the space between to be filled with gravel or broken stones, and to be floored with boards not less than two inches thick and twelve feet long. As the legislature has specifically confined such additional duty or burden to the crossings of "regularly laid out public highways" only, we do not think we have the right by judicial construction to extend or enlarge the terms of the statute and thereby to impose additional burdens or duties upon railway companies. In the statute of 1868 the word "highway" was used. In the statute of 1869 the words "public highway" were employed. In Sec. 1, Ch. 105, Laws 1876, only "regularly laid out public highways" are mentioned. Then again, by the terms of Sec. 2 of Ch. 105, a penalty is provided of a fine of five dollars for each and every day that a railroad company fails to comply with the provisions of Sec. 1. While all statutes, whether penal or remedial, are to be construed according to the apparent intent of the legislature, to be gathered from the entire language used in connection with the subject matter and purpose of the law, it is a cardinal rule of construction that penalties are not to be enforced by enlarging the scope of the statute. Where penalties are provided the statute must be strictly construed. Snyder *v.* North Lawrence, 8 Kas. 82. If the railway company was charged with failing to comply with the provisions of the first section of said Ch. 105, and an attempt was made by action to make it liable to a fine of five dollars for each and every day it had so failed to comply therewith, we do not think that evidence showing that the highway had been in use for public travel would be sufficient upon which to base a recovery of the statutory penalty. The legislature has seen fit to limit the keeping in repair of crossings over highways by railway companies to those highways that have been "regularly laid out." The statute of 1876 is plain and unambiguous. There is no room left for construction, and therefore within the statute the way mentioned and referred to in the petition is not such a highway as the railroad company was required to keep in repair at the crossings over it in the city of Burlington. It was undoubtedly the intent of the legislature to require crossings to be kept in repair by the railway companies in the State over such public highways only as are regularly laid out. This would embrace all highways laid out under the provisions of any statute, and perhaps all streets or roads laid out by dedication for such purpose where there is a public record establishing the highway or street. It is more in reason that the legislature in adopting the statute of 1876 had in view such highways only as the railroad companies could ascertain had existence from

the statute or public records, and not such highways as the existence of which depend upon the parol evidence of the people of the neighborhood using temporarily a way for travel not legalized or laid out by statute or established by dedication upon any public record. A Wisconsin statute requires under a penalty for neglect the erection of guide boards at certain points upon "legally laid out roads." *Held*, that the words "legally laid out roads" apply only to roads laid out by the authorities in accordance with the statute upon that subject, and not to roads which have become such by mere use or dedication. See State *v.* Huck, 29 Wis. 202; Doughty *v.* Brill, 36 Barb. 488; Christy *v.* Newton, 60 id. 332; Talmadge *v.* Huntting, 29 N. Y. 447; Parker *v.* People, 22 Mich. 92; Roberts *v.* Highway Com'rs, 25 id. 23; People *v.* Smith, 42 id. 138; State of Wisconsin *v.* Siegel, A. L. J. vol. 25, No. 23, 458. It is well settled that user alone of unenclosed and wild prairie land will not support a prescription for a highway. State *v.* Railway Co., 45 Ia. 143. In this State where so much of the land is yet vacant and uncultivated, many roads are travelled for a great length of time without the intention or expectation on the part of the public or the owners of the premises that such ways are permanent or that such roads are to be considered as public highways or legally laid out highways. As other roads are established or regularly laid out, these ways so used temporarily by the public are vacated, changed and fenced up without resort to the usual proceedings for the vacation and change of public highways; and it would be an exceedingly harsh doctrine to say that such roads running over vacant and uncultivated land have become public highways by user, when the owners of the premises never intended to consent thereto. Again, it is frequently the practice, even in our towns and cities which are laid off into lots, blocks, parks, alleys, streets and avenues, for the public, where the lots and blocks are vacant and unenclosed, to travel across them and establish by use, for a time, a road for the travel of the public generally, regardless of the existence of streets regularly laid out. Often the roads thus travelled are so used for a long time, but whenever the lot or block thus occupied by travel is wanted by the owner for actual occupation the road so travelled is at once closed and the lot or block enclosed without regard to the travel across the same, and the user alone of such unenclosed and vacant lot or block in this manner ought not to be sufficient to establish over the premises a public highway. The evidence in this case illustrates this: The place where the accident occurred is in the city of Burlington. There is one street ninety feet north of it, and another about one hundred and thirty feet south. In 1857 persons commenced to travel through Burlington to the westward; there were two routes travelled, one on the north side of Rock Creek, and one on the south side. The latter was commonly known as the highway leading from Burlington to Verdigris Falls. This was known and desig-

nated as the "Eureka Road." The travel commenced over this route while most of the land belonged to the government, and was travelled before any highways had been legally established or otherwise regularly laid out. The line of travel on this road had changed from time to time and from place to place as the occupation and improvement of the premises over which it ran required. At the time of the accident nearly the whole of the route originally travelled from Burlington west to north of Big Creek or Verdigris Falls had been vacated or changed from its original direction, excepting a short distance thereof, most of which was near to or within the city of Burlington. The long road running over unenclosed and uncultivated land had been curtailed by fences and enclosures, until all that was left of the original route was the part adjacent to Burlington and the part within the city, and according to the testimony the road within the city ran in a zigzag direction, and was travelled because it was a little nearer and a little more convenient than to go on the streets. Within the city, when persons fenced and improved the lots crossed by this road, the road was at once changed to run around such enclosures and fences; it did not occupy any public street of the city or any premises dedicated and set apart upon the plat of the city for a public highway, nor was it regularly laid out under the provisions of any statute. While, therefore, there was ample proof in the case that portions of the road had been very generally travelled by the public ever since 1857, yet the general direction of the road had been during all the time over vacant and uncultivated land. From time to time, as the settlers came into the country and took up and occupied the land, they fenced up the prairie and changed the road from one place to another. The road, therefore, in our opinion, is not within the terms of Sec. 1 of said Ch. 105, Laws of 1876. It is not a regularly laid out public highway. The travel going over it was liable at any time to be diverted from the road by the changes caused by the fencing up and settlement of the country and the enclosing or improvement of lots within the city.

Something was said in the oral argument before us about the railroad company being liable independent of the statute. Not so. Passing beyond the petition, the evidence does not establish such a public highway in view of the frequent changes of the route of the road as that at common law the company would be liable for creating an obstruction or defect by the construction of its road-bed and track across it.

Our attention has been called to the case of Kelly *v.* Southern Minn. R. Co., N. W. Reporter, vol. 9, No. 8, 588, in which it was decided that where a road is used openly and notoriously by the public as a highway, and a railroad company recognizes it as such by permitting the public to cross their track and by attempting to maintain a public crossing at that point, it is immaterial whether

the road be a legal highway or not, and that under such circumstances the company is bound to exercise the same precautions to keep crossings in repair as though the road were in fact a legal highway. The allegations in the petition do not present such a case as referred to in that decision. It is nowhere alleged in the petition that the railway company attempted to maintain a crossing at the point where the plaintiff below was injured. On the other hand the allegations are that while the public travelled continuously on the way as a highway for twenty-one years, the railroad company "wholly failed, neglected and refused to construct a good, sufficient and safe crossing at the point where said railroad crosses said public highway, and for more than ten years last past has wholly neglected and refused to construct a good, sufficient and safe crossing whatever at the point where the railroad crosses said public road, although often requested so to do." Instead of alleging that the railroad company recognized the way as a public highway and permitted the public to use it as a public highway, and attempted to maintain a crossing at the point where the railroad crosses the way, these latter allegations tend to show that the railway company did not recognize or treat the road as a regularly laid out public highway, or as any legal highway, because the inference of such allegations is that the railway company never constructed or maintained any crossing at the point where the injuries complained of were inflicted. Apart, however, from this view, we are to be controlled by the statute of our own State. Under the provisions of the statute of 1868 the duty is imposed upon railway corporations crossing the highways to restore them to their former state. But the statute of 1876, which requires railway companies to keep in repair at each crossing of the highway good and substantial crossings, applies only to such highways as have been "regularly laid out." The petition therefore is held by us not to state facts sufficient to constitute a cause of action. In its ruling upon the petition, in the admission of evidence, and in the direction to the jury, the trial court seems to have held to the theory that all railroad companies in this State are required by statute to construct and maintain good, sufficient and safe crossings at all points where their railroad crosses any way used for travel by the public for fifteen years or upwards, whether the road runs over vacant or unenclosed land, and that a neglect or refusal on their part to do so renders them liable to any person who sustains damages thereby for the full amount of such damages. This theory, so far as to the maintaining of crossings is erroneous, excepting where the highways have been regularly laid out.

The judgment of the district court will be reversed and the cause remanded.

All the justices concurring.

See Flint, etc., R. R. Co. v. Willey, 5 Am. and Eng. R. R. Cas. 305.

KELLY
v.
SOUTHERN MINNESOTA R. R. CO.

(*Advance Case, Minnesota. July* 2, 1881.)

In an action for injuries resulting from the alleged negligence of a railroad company in neglecting to maintain in a safe condition a highway crossing, in not replacing a plank which had been removed, *held*, that it was proper to allow plaintiff to prove that after the injury defendant repaired the crossing by replacing the plank. Where a road is used openly and notoriously by the public as a highway, and a railroad company recognizes it as such by permitting the public to cross their track, and by assuming to maintain a public crossing at that point, it is immaterial whether the road be a legal highway or not. Under such circumstances, the company are bound to exercise the same precautions to keep the crossing in repair as if the road were in fact a legal highway. The fact that a person attempts to pass over a railroad crossing on a highway after he has notice that it is unsafe, by reason of being out of repair, does not necessarily constitute negligence, nor is he necessarily bound absolutely to refrain from pursuing his course. This would depend upon the circumstances of the case. If, under the circumstances, he had reasonable cause, in the exercise of ordinary care and discretion, for believing that he could pass over in safety, and exercised due care in attempting to do so, he would not be guilty of negligence. In this case, under the evidence, these were questions of fact for the jury.

BENJ. G. REYNOLDS, for appellant.
M. W. Green, for respondent.

MITCHELL, J.—This is an action for damages for injuries to plaintiff's horse, caused by the alleged negligence of defendant in failing and neglecting to maintain and keep in a safe condition a crossing where defendant's railroad intersected a highway. The negligence complained of was that a plank which should have been kept fastened next to and alongside of the iron rail had been torn up and removed, thus leaving a space or hole between the surface of the highway and the railroad track into which the foot of plaintiff's horse was caught and injured while being driven on the highway over said crossing. The answer of defendant denies any negligence on its part, and alleges that the injury complained of was caused by the negligence of plaintiff himself.

The trial resulted in a verdict for the plaintiff. Defendant moved for a new trial on the ground of error in law occurring at the trial and duly excepted to, and that the verdict was not justified by the evidence and was contrary to law. The motion having been denied, defendant appeals. The first assignment of error is that the court, under defendant's objection, allowed certain witnesses for

plaintiff to testify how the planks at these railroad crossings were usually laid. The objections made to this evidence were two: First, that the witnesses were not qualified to give an opinion on the subject, not having been shown to have any special experience in such matters; second, that evidence of what was usual in such cases was not competent. To the first objection it is sufficient to say that the witnesses were not being examined as experts, or called on to give an opinion, but to state a fact. Evidence as to the manner in which these planks were usually laid at such crossings was competent; the degree of care which was required of defendant in maintaining this crossing being that which men of ordinary prudence would usually exercise under like circumstances. Evidence as to the manner in which such crossings were usually constructed was competent, although, of course, not conclusive evidence against defendant on the question of negligence.

The next assignment of error is that the court permitted plaintiff, under defendant's objection, to inquire of another person how his horse's foot got caught at this crossing. It would have been competent for plaintiff to show that similar accidents occurred by reason of the same defect, as tending to show that the absence of this plank rendered the crossing unsafe. We think that the court had a right to presume that this was the purpose of the inquiry, no objection having been made to the question on account of its indefiniteness. The answer, however, disclosed the fact that the accident inquired of was produced by a different cause, and at a point in the crossing, about the condition of which there was no complaint. Upon the immateriality of the answer thus appearing, the defendant, if he deem it prejudicial to himself, ought to have moved to have it stricken out. It is further urged that the court erred in permitting plaintiff to show that after the accident defendant repaired the crossing by replacing the missing plank. Such evidence has been repeatedly held competent. Westchester R. Co. *v.* McElwee, 67 Pa. St. 311; O'Leary *v.* Mankato, 21 Minn. 65; Phelps *v.* Mankato, 23 Minn. 276.

Defendant also took exception to the ruling of the court admitting evidence tending to show that the locus in quo had been opened, worked, and travelled continuously for ten years as a highway. This was competent evidence tending to prove the existence of a highway by common-law dedication. But the evidence was admissible upon still another ground. Even if this was not a legal highway, yet if it was openly and notoriously used as such by the public, and the defendant recognized it as such by permitting the public to use it, and by assuming to maintain a crossing at that point, they would be bound to exercise precisely the same precautions to keep it in repair as if it was in fact a legal highway. Webb *v.* Portland and Kennebec R. Co., 57 Me. 117. The evidence disclosed the fact that plaintiff's servant was informed that the

crossing was unsafe and out of repair before he drove across it. In view of this evidence defendant moved, when plaintiff rested, to dismiss the action because it appeared that plaintiff was guilty of negligence which contributed to produce the injury. The court refused to grant the motion. Again, at the close of the evidence the defendant requested the court to charge the jury: "That if plaintiff's servant who drove the team over the crossing knew before he crossed the same that it was unsafe or dangerous, then the plaintiff in crossing the same, by his servant, after such knowledge, was guilty of contributory negligence, and cannot recover. If the plaintiff's son who drove the team was informed that the same was unsafe or dangerous, and he crossed it after such information, then the plaintiff was guilty of contributory negligence which contributed to the injury, which would prevent a recovery." The court granted the requests, but qualified and explained them by saying: "The crossing might be dangerous for crossing in one manner, as by a team with a driver not in immediate charge of it, but walking behind the vehicle as he had been doing before approaching the crossing, but reasonably safe and not dangerous if the driver were in charge of the team upon his load." To this qualification and explanation the defendant excepted.

The court was correct, both in the refusal to dismiss and in qualifying the requests to charge the jury. The radical error of defendant in both instances was that he assumes that it was necessarily negligence to attempt to drive over the crossing after notice of the fact of its being out of repair, without regard to the circumstances of the case or the nature of the defect. The fact that a person attempts to travel on a highway after he has notice that it is unsafe or out of repair, is not necessarily negligence. This depends on circumstances. He cannot, of course, heedlessly or recklessly run into danger. But when he knows that a highway is out of repair, whether he ought absolutely to refrain from attempting to pass over it, or whether he would be justified in making the attempt, using such a degree of care in so doing as would be adequate and commensurate with the condition of the road, is a question of fact to be determined from all the circumstances of the case. Even if plaintiff's servant knew that this crossing was out of repair, he was not bound to anticipate all the perils to which he might possibly be exposed, or to absolutely refrain from pursuing his usual course on account of risks to which he might possibly be exposed. Some risks are taken by the most prudent of men, and the plaintiff would not be debarred from recovering for this injury if his servant adopted the course which prudent men would ordinarily pursue under like circumstances. Johnson *v.* Belden, 2 Lansing, 433.

Defendant is not excused merely because the plaintiff's servant knew that some danger existed through defendant's neglect, and

voluntarily incurred such danger. The amount of the danger, and the circumstances which led plaintiff's servant to incur it, are ordinarily questions for the consideration of the jury. Clayords *v.* Dethrick, 12 Q. B. 439; Humphreys *v.* Armstrong Co., 56 Pa. St. 204. It would be a very harsh and unreasonable rule if a traveller on a highway was compelled, under all circumstances, when he knew a highway was out of repair or unsafe, absolutely to refrain from pursuing his journey, without regard to circumstances, and without reference to the extent of the danger, or else pursue his course entirely at his own risk. Previous knowledge of the unsafe condition of this crossing was a circumstance to go to the jury on the question of contributory negligence; but it should be submitted to them, together with all the other facts of the case, for them to determine whether, with such knowledge, plaintiff's servant exercised ordinary care in attempting to drive over this defective crossing, and whether in proceeding he used ordinary care to avoid injury. If the risk was such that men of ordinary prudence, having knowledge of the defect, would not, under the circumstances, have attempted to pass over it at their own risk, then plaintiff's servant had no right to attempt to pass it at the risk of the defendant. But if such persons would have believed it reasonably safe to attempt the passage in the manner adopted by plaintiff's servant in this case, plaintiff could recover, notwithstanding such previous knowledge of the condition of the crossing. Thomas *v.* Western Union Telegraph Co., 106 Mass. 156; Maloney *v.* Met. R. Co., 104 Mass. 73; Lyman *v.* Amherst, 107 Mass. 339; S. & R. on Negligence, § 414.

In the present case a court would have no right to hold that it was negligence per se to attempt to drive over this crossing with knowledge of the fact of the removal of this plank. That was eminently a proper question for the consideration of the jury, in view of all the circumstances of the case. The case was, therefore, properly submitted to the jury under the instructions of the court, and we are of opinion there was sufficient evidence to sustain their verdict.

There were other exceptions taken at the trial, but none of them, in our judgment, present any question requiring special consideration. Order appealed from affirmed.

See Bennett *v.* Louisville, etc., R. R. Co., 1 Am. and Eng. R. Cas. 71; Flint, etc., R. R. Co. *v.* Willis, 5 Am. and Eng. R. R. Cas. 305; note, p. 57, ante.

TUCKER
v.
DUNCAN.

(*U. S. C. C., Southern District of Mississippi. November Term*, 1881.)

Railroad employees are as worthy of belief as other agents. All agents and employees are presumed to be friendly to their employer, and on that account are usually subjected to a rigid cross-examination; but when this is done, their evidence must be weighed as other testimony, and its value estimated in connection with all the facts proven.

When the injuries complained of are the result of inevitable accident, no compensation can be allowed.

It is the duty of one desiring to cross a railroad to use his powers of hearing and of vision to ascertain whether or not there is likely to be an approaching train, and if so, to stop until the danger is past. If there is no obstruction to either the sound or vision, then the passer need not stop, but must use both these faculties; if there is such obstruction, then it is his duty to stop and both look and listen; and if he neglects to use these precautions and a collision takes place, compensation cannot be given, unless it was caused by the gross negligence or wrongful conduct of the employees conducting the railroad operations.

HUMPHRIES & SYKES and Wiley P. Harris, for petitioner.

E. L. Russell, Peter Hamilton, J. M. Allen and L. Brame, for defendant.

HILL, J.—This is a complaint made by the said Tucker, in which he alleges that, on the 11th day of October, 1880, he was with his wagon drawn by one horse, crossing the Columbus branch of the Mobile and Ohio R. R., on St. John Street, in the City of Columbus, when, without any carelessness or default on his part, but by the carelessness and improper conduct alone of the employees operating the engine and train of said receiver, upon said railroad, his wagon was run against and thrown over, and by means of which he was thrown from his wagon and received sundry dangerous and severe wounds, endangering his life greatly, disfiguring him and causing him great bodily pain, and for which he claims $25,000 damages as compensation. To the complaint the defendant answers, that the injuries complained of were caused by the careless and reckless conduct of the petitioner alone, and not by the carelessness or want of skill or misconduct upon the part of his employees, as alleged in the petition. Upon the issue thus made, a large volume of evidence has been taken and submitted to the court, and upon which exhaustive comment has been made by the distinguished counsel on both sides, all of which has been carefully considered with the sole view of arriving at a correct conclusion as to whether or not, under the testimony and rules of law applicable to it, the petitioner

is entitled to compensation, and if so, for what sum? The proofs show the following indisputable facts.

The point at which the accident occurred is at the crossing of St. John Street over the railroad in charge of the defendant as receiver, under the appointment of the court, and in the city of Columbus; that the crossing is a dangerous one for those passing on this street going south, from the fact that it is near the depot, and near the side track used for switching off cars and making up trains, and over which point locomotives and trains necessarily have to pass many times during the day; the danger is further increased from the fact that there is a brick warehouse situated east of the street and north of the railroad, extending 250 feet from near the track of the road north on the street, and 240 feet east of the street, and being some 17 feet high, obstructs the view from those passing south on the street; the danger is still further increased by the narrowness of the street near the crossing, being only fifteen or sixteen feet wide, with a deep and wide ditch or wash-out on the west side; the street is also covered with gravel which causes a noise when vehicles pass over it. The depot, side track and switches used by the railroad are situate east of and near this crossing, and that in making up trains the locomotives must necessarily pass this crossing; that the time for the departure of the evening train was forty minutes after three, P. M., and that the practice was to commence making up the train an hour or more before train time, and that at the time of the occurrence complained of, the locomotive was employed in making up the evening train, being about three o'clock, P. M. It is also an indisputable fact that petitioner was driving a spring wagon loaded with rails, and drawn by one horse, coming down St. John Street, going south; that when near the crossing, and at a place where the street was too narrow to turn around, the locomotive approached the crossing, the horse became frightened and stopped for a moment, when petitioner urged him on with the purpose of passing in front of the locomotive; that the fore wheels of the wagon passed the end of the pilot of the engine, but that the hind wheels, or one of them, was caught on or struck the end of the pilot which threw the wagon on its side; the horse being frightened sprang forward and disengaged himself from the wagon; the petitioner was thrown forward upon the street and was thereby greatly wounded, injured and disfigured, causing him great pain and suffering, and which injuries may prove permanent. There was not then, and never had been, any sign board erected at that point warning passers of approaching trains, nor any other warnings or signals given other than the ringing of the bell or blowing of the whistle. These are all of the disputed facts that need be stated. There are others, and upon which the questions submitted must greatly depend, about which there is more or less conflict between the witnesses of petitioner and defendant.

The conductor of the train, the engineer who was operating the engine, the brakeman who was then employed in changing the switch or throw rail, the fireman then engaged on the locomotive and whose business it was to ring the bell, also another witness—all testify that at the time the collision took place, and before, whilst the locomotive was in motion, the bell was ringing. It is also in proof that soon after the accident the petitioner stated that the bell was ringing. The petitioner has introduced the testimony of a number of witnesses, stating that they were near enough to have heard the bell if it had been ringing; some speak in more positive terms that it was not rung; and others that, if it was, that they did not hear it. Other witnesses state that it was the general practice to ring the bell when the engine was in motion, but that it was sometimes omitted; some witnesses stating that the omission was frequent, and others that it was not. It is also in proof that accidents have occurred at this crossing before, or were barely escaped. It was the duty of the conductor and of the engineer to see that the bell was rung, and it is to be presumed that the brakeman would also observe this duty; it was also the duty of the fireman to ring it. All these swear positively that it was rung.

The testimony on the other side is, with one or two exceptions, of a negative character, and those stating most positively do not state reasons for remembering that they were listening, and that the bell was not ringing, and then the declaration of the petitioner himself to his physician when attending to his wound immediately after the accident, explaining how it occurred—that the bell did ring—in my judgment gives a decided preponderance in favor of the proposition that the bell was rung. I cannot assent to the position that the employees of a railroad are less worthy of belief than other agents. All agents and employees are presumed to be friendly to their employer, and on that account are usually subjected to a rigid cross-examination: but when this is done, their evidence must be weighed as other testimony, and its value estimated in connection with all the facts proven.

It is contended by petitioner's counsel that no weight should be given to petitioner's declaration made in the presence of the engineer, as testified to by him, as to the ringing of the bell, because of the want of credibility of the witness, the unreasonableness of his statement, and the suffering condition of the petitioner. I am of opinion that the statement of the witness is not unreasonable; he was but a short distance from him, and immediately sprang to him, and most probably made the inquiry before he was aware of the extent of the injury, and the answer was made when the facts were present before the mind of the petitioner.

The most satisfactory conclusions as to the real occurrences immediately preceding and at the time of the collision, are to be drawn from the statement made in evidence by the petitioner him-

self, and his declaration made soon after to Dr. Vaughn and the physical facts attending it, as shown by the evidence and uncontroverted. The petitioner in his deposition, in reply to the question as to how the injury complained of was occasioned, made the following answer: "As I got near the railroad crossing, my horse became very much frightened at seeing the locomotive approaching, and I pulled the reins to stop him, but he was so excited I failed, or could not stop him; I said 'whoa' to him twice; he did not stop at all; the engine was then immediately in front of him; I then became wonderfully excited myself to see how I could escape; the street was too narrow, I could not turn around; I saw the horse was determined to go forward, and, believing it was the only chance to save my life was to let him go, I slackened the rein, and he darted violently forward; the cow-catcher, to the best of my knowledge, struck the wagon at the hind wheels, and threw me twelve or fifteen feet forward on the street; I was knocked senseless, and do not know anything more about the particulars."

Dr. Vaughn testifies, "that soon after the collision he was called to dress the petitioner's wounds, when he asked petitioner as to the manner of their infliction; he replied that he had been run over by a locomotive at the crossing at St. John Street and thrown into the ditch near by; that the rear of the wagon had been struck by the locomotive; that, hearing the bell and the locomotive coming, he tried to stop his horse; that the more he pulled, the faster the horse went; finding that he could not stop him, he tried to cross the track by driving him up, with the result as stated."

James Sykes testifies: "that after the accident petitioner stated to him that he was driving his wagon not thinking of the engine or cars until he approached near the corner of the warehouse; that he heard no bell, is what I think he said, or, as I now recollect, he said he heard no noise; that the engine came suddenly by, or came in sight, or view of his horse, who became very much frightened, and he gave him a cut with a whip to make him jump across the road ahead of the engine, which he thought was his only safety."

The undisputed physical facts are, that the horse and fore wheels of the wagon had passed in front of the engine before any collision took place, and that either the end of the pilot ran into the hind wheels of the wagon, or that by a sudden turn of the wagon to the left, the hind wheels of the wagon ran upon the end of the pilot. From the rapidity with which the wagon must have been moving and the slow motion of the engine at the time, I am of the opinion that the wagon ran on the pilot. The testimony of the engineer is, that when he saw the petitioner, he reversed the engine and put on the steam to stop it; he was scarcely moving the engine when the collision took place. This statement is sustained from the fact that the horse and fore wheels of the wagon passed in front of the en-

gine before the collision took place, which could not have been done, had the engine been moving at any but the slowest speed.

This is a sufficient statement of the facts as shown from the proof, with this addition, that the petitioner was well acquainted with the danger of the crossing, and the time of the making up and leaving of the trains. There is little difference of opinion as to the rules of law properly applicable to the facts as stated. See R. R. Co. *v.* Houston, 95 U. S. 697; Tilfer *v.* R. R. Co., 1 Brown (N. J.), 188.

The petitioner, to entitle himself to compensation, must show, first, that the collision occurred without any negligence, carelessness, or wrongful act on his part; and, secondly, that it was the result of the carelessness, negligence, or some wrongful act upon the part of the employees of the defendant, or of the defendant himself. If it was from inevitable accident brought about by the unmanageable conduct of the horse, or otherwise not attributable to the defendant or his employees, then no compensation can be allowed.

These rules are so plain and so well understood, that reference to the authorities to sustain them is unnecessary.

When a crossing is dangerous, the duty is imposed upon those engaged in conducting the engine and trains upon the road, and also upon those desiring to make the crossing, to use every reasonable precaution to avoid a collision; and the necessity is increased in proportion to the danger. This duty is required equally of both parties. It is the duty of those conducting the train to give a signal by having the bell rung, or blowing the whistle, when approaching a crossing, to warn passers of the approach of the engine or train, and to look and ascertain whether or not any one is about to cross the track in front of the locomotive, and, if so, to slacken up the speed, and, if need be, and if in the power of those in charge of the train, to stop the train, in order to avoid a collision. See Continental Improvement Co. *v.* Stead, 95 U. S. 161.

This is the duty on one side, and upon the other it is the duty of those desiring to make the crossing to use their powers of hearing and of vision to ascertain whether or not there is likely to be a passing locomotive or train, and if so, to stop until the danger is past. If there is no obstruction to either the sound or vision, then the passer need not stop, but must use both these faculties; but if there is such obstruction, then it is his duty to stop and both look and listen; and if he neglects to use these precautions, and a collision takes place, compensation cannot be given, unless it was caused by gross negligence or wrongful conduct of the employees conducting the railroad operations, the general rule being that, if the injured party contributes to bringing about the injury, he cannot recover, although the employees may not be wholly blameless.

The petitioner knew the dangerous condition of the crossing;

that the warehouse formed an obstruction to the sight and sound of the locomotive coming from the east, and also knew, or had reason to know, that it was the time for making up the train; it was therefore his duty, before attempting to cross the track, to both look and listen for the approach of the locomotive and, if need be, to stop for that purpose. See Pennsylvania R. R. Co. *v.* Beale, 73 Pa. St. 504; Alyn *v.* Boston R. R. Co., 105 Mass. 77.

According to the admission of the petitioner, this he neglected to do until his horse was frightened by the approach of the locomotive. Had the horse not become frightened, he was a sufficient distance from the locomotive to have stopped him and waited for it to pass or get out of the way. Whether the fright of the petitioner caused him not to control his horse, or that the horse could not be controlled, the fact is that it was not done, and he urged him forward before the engine with the hope of escape, and the collision ensued. This calamity to the petitioner is certainly very much to be regretted, both on his account and those dependent upon him, but one which is difficult from the evidence to attribute to the defendant or his employees. See New Orleans, etc. R. Co. *v.* Mitchell, 52 Miss. 808. The proof is that the horse was unusually gentle and used to crossing at that point; yet the proof is equally clear that on this occasion he became frightened without more than usual cause.

Certainly this could not be apprehended by the engineer; he had a right to presume that the petitioner would not stop until the danger was past, and could not reasonably suppose that the petitioner would run the hazard of attempting to cross in front of the locomotive. The testimony of the engineer, supported by the physical facts referred to, show that the engine was nearly a standstill when the collision took place. The engineer could have done nothing more than he did. A careful consideration of the testimony satisfies me that the petitioner did not exercise the caution demanded of him; and that this cause, and his own alarm and reckless attempt to pass in front of the engine, with the fright and action of the horse, caused the collision, without fault upon the part of the defendant, or of his employees, wherefore, under the rules stated, compensation must be refused.

See note, p. 123, ante.

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See note, p. 123, ante.

LAVERENZ, Adm'r, etc.,

v.

C., R. I. AND P. R. Co.

(*Advance Cass, Iowa. October* 21, 1881.)

Where a party voluntarily goes upon a railroad track where there is an unobstructed view, and fails, without excuse, to look or listen for danger, he is, as a matter of law, guilty of negligence, and not entitled to recover for damages he may sustain by reason thereof from a passing train. But where the view is obstructed, so it is difficult to know of the approach of the train, or there are complicating circumstances calculated to deceive or throw him off his guard, the question is one for the jury.

Question as to whether deceased plaintiff's intestate was guilty of contributory negligence, *held*, to have been properly submitted to the jury.

Certain special findings were requested by defendant, to which the jury returned answers that they "did not know" or "could not tell." *Held*, that as the answers, had they been in favor of the defendant, would not have been inconsistent with the general verdict rendered, the indecisive answers were no ground for reversal.

APPEAL from Scott District Court.

This is an action to recover damages for a personal injury resulting in the death of James Fisher, plaintiff's intestate, at Wilton, Iowa, in the month of August, 1877. There was a trial by jury, and verdict and judgment for the plaintiff. Defendant appeals.

Cook & Dodge, for appellant.

Bills & Block, for appellee.

ROTHROCK, J.—1. The action was commenced in the circuit court of Scott County, and at the March term, 1879, upon a trial, the jury returned a verdict for the plaintiff for the sum of $5000. A motion for a new trial was sustained by the court upon the ground that it appeared from the evidence that said Fisher was guilty of such contributory negligence as to preclude any right of recovery. At the June term, 1879, of said court the cause was again tried, and a verdict was returned for the plaintiff for $6000. A motion to set aside the last-named verdict was also sustained. From an order setting aside the verdict and granting a new trial the plaintiff appealed to this court, and the judgment of the circuit court was affirmed. See 53 Iowa, 321. When the cause was remanded to the circuit court the venue was changed to the district court of Scott County. The cause was tried in that court, resulting in a judgment for the plaintiff in the sum of $6000, and from this judgment the present appeal was taken. To the end that the

questions discussed by counsel may be fairly understood, it is necessary to make a brief statement of what we regard as undisputed and material facts in the case.

James Fisher, the plaintiff's intestate, was a farmer and dealer in live stock, and resided in Kansas. On the twenty-seventh of August, 1877, the defendant entered into a contract with one Ward to transport four car loads of hogs from Atchison, Kansas, to Chicago. Fisher signed the contract for Ward, and by the terms of the contract Fisher was to be transported by the same train, without charge, to take care of the stock. The train arrived at Wilton, Iowa, on the afternoon of August 23d. The south-western branch of defendant's road here forms a junction with the main line, and in accordance with the usual custom a new train was made up by changing the engine and caboose car, and parties in charge of stock were required to take passage on another caboose from that used on the south-western branch. There was a delay at Wilton of from 20 to 25 minutes. The train, which was made up to go East, consisted of some 23 or 24 cars, and when made up, ready to start, the engine stood fronting east, and from 160 to 175 feet west of the freight depot, and the train extended back west, the caboose being the last car on the west end. Some five minutes, or a very short time, before the train started, Fisher was in the train-master's office, in the depot, making complaint of the slow time made in transporting the stock in his charge. From the freight depot, running west, there are four railway tracks, nearly parallel, and from seven to nine feet apart. The main track was immediately next to the depot platform on the north. Next to that was another track, on which was Fisher's train, about to start east. North of that was the third track, and at the west end of the depot the fourth track branched off on the south side. A switch or cross-track started from the main track, near the west end of the depot and crossed to the next track on the north. It was not customary for this train to stop so as to bring the caboose to the platform, and parties desiring to ride on the train were expected to walk back to the caboose. About the time or before the train started, Fisher left the depot platform, apparently on his way to the caboose. He was compelled to cross the main track, and may have crossed some of the other tracks. He was seen, however, walking down west in the space between the main track and the track on which his train was about to pull out. This space was about seven feet nine inches wide between the rails of the two tracks. As he walked down this space toward his train the engine was approaching him on an up grade, laboring heavily, making a loud noise by steam escaping from the top, and, as the evidence tends to show, from the open cylinder cocks. As he approached the engine he left the space in which he was walking and went upon the main track and walked on west. The engine which

pulled in the train on the branch road had been switched over on the main track, and about the time Fisher started for his train this engine was at a water-tank some distance east of the depot. It backed down to the depot and came to a stop, or nearly so, and took on two men, employees of the road. The speed of the engine was increased, and it backed west on the main track, and as Fisher walked upon that track he was struck by the end of the tender in the back and knocked down, and the engine passed over him lengthwise, and he was found dead upon the track, having been crushed by the ash-pan of the engine, as is supposed. These are leading facts, and about which there is no real dispute. It is impossible in an opinion of ordinary length to recite all the facts and circumstances which enter into a case of this kind, and which have much to do in determining the rights and obligations of the parties. Other facts will, however, be noticed in determining the questions in the case. It does not appear to be seriously questioned that the jury were warranted in finding that the defendant was negligent in backing the engine upon the deceased. Indeed, taking into consideration the fact that Fisher was a passenger upon the train, and was expected to board the caboose by crossing the main track, at least; that the engine was backed with such speed as to overtake and throw him upon the track and crush him, without being seen by those in charge of the engine; and the further fact that there was evidence tending at least to show that the person in charge of the engine, as engineer, was incompetent to properly manage an engine—we think we would be weakening the rule holding the carrier of passengers to the highest degree of care if we should determine that there was no warrant in the evidence for finding that the employees of the defendant were negligent.

2. The main question in the case, and that upon which counsel for appellant with confidence rely upon a reversal, is the alleged contributory negligence of the deceased. It is said that because the deceased, when he stepped upon the main track, did not look to see if the track was clear, and because he walked thereon without looking for an approaching train or engine, and while thus walking thereon was killed, his representative cannot recover. We are required to determine whether or not, under the facts and circumstances surrounding the deceased, the court below should have determined as a question of law, that the plaintiff was not entitled to recover because of contributory negligence. If the plaintiff had not been killed, and had brought an action for injuries inflicted, under the circumstances of this case, and it had been shown without conflict or dispute, either by his evidence or otherwise, that he started for the train after it was in motion; that he crossed the main track and entered upon the space between the tracks and was proceeding to the caboose when he met the engine; that he

was not confused by the noise and discharge of steam from the top and the cylinder of the engine; that he had ample room to pass the engine by keeping in the space between the tracks without being burned or annoyed by the escaping steam; that he knew if he crossed over the rail to the south of him he would be upon a track; and that with such knowledge he voluntarily went upon the track without either looking or listening for danger—there would be much reason for holding that, as a matter of law, he could not recover. It is true that where a person voluntarily goes upon a railroad track where there is an unobstructed view of the track and fails, without excuse, to look or listen for danger, as matter of law he is not entitled to recover. He must take the chances of injury from an approaching train upon himself, unless the persons in charge of the train see his danger in time to avert it. Curlin *v.* C., R. I. & P. R. R. Co., 37 Iowa, 316; Benton *v.* Central R. R. of Iowa, 42 Iowa, 192; Long *v.* H. C. R. Co., 49 Iowa, 419; Artz *v.* C., R. I. & P. R. R. Co., 34 Iowa, 153.

In the last case a large number of authorities are cited upon the question as to when contributory negligence becomes a matter of law. In that case it is said that "if the view of the railroad, as the crossing is approached on the highway, is obstructed by any means so as to render it impossible or difficult to learn of the approach of a train, or there are complicating circumstances calculated to deceive or throw a person off his guard, then, whether it was negligence on the part of plaintiff, or the person injured, under the particular circumstances of the case, is a question of fact for the jury." See, also Moore *v.* Central Railroad of Iowa, 47 Iowa, 688, and Farley *v.* C., R. I. & P. R. R. Co., 9 N. W. Rep. 230. These and many other cases which might be cited establish the doctrine beyond question that a person is not necessarily, and as a question of law, negligent in going upon a railroad track without looking and listening for approaching trains. Apply this rule to the case at bar, and we think it was a question of fact for the jury, under all the circumstances, to determine whether the deceased was guilty of such negligence as to preclude a recovery. There were many circumstances proper for the consideration of the jury in determining the question. Some of these may be mentioned. The space between the tracks where the deceased was walking was about seven feet nine inches wide. About two feet of this distance was occupied by the parts of the engine and train which projected over the track. How much more was obstructed, so to speak, by escaping steam does not appear. The tracks of the switch were near where the deceased was walking. It was very proper for the jury to determine whether a person, under these circumstances, might not, in the exercise of proper prudence, step upon the main track without even being aware that he was upon a track. In determining this the noise and confusion, the network

of tracks, the fact that the train was about to leave him behind, and other circumstances, were proper subjects for consideration.

It is urged with great earnestness that the deceased had ample opportunity to board the caboose before the train started, and that he was guilty of negligence in crossing the tracks and walking along them after the train was in motion. The deceased was required to change cars. He was rightfully and properly at the depot. He was not required to go into the yard to get into the caboose while the train was being made up. It does not appear that the train had started when he left the depot. The engineer of the train testifies that when he saw Fisher, and when the accident happened, he "had just hooked on the train and started. The engine had only made two or three revolutions." No call was given to passengers that the train was about to leave. In the language of the engineer they had just hooked on and started. And the jury, we think, may fairly have found that Fisher was in the space between the tracks before any attempt was made to start the train.

3. With the general verdict the jury returned certain special findings of fact, which were submitted to them at the instance of the defendant. They are as follows:

"(1) Had the decedent, James Fisher, on several occasions previous to the day when he was killed, passed through Wilton on defendant's railroad by freight or stock trains, and changed caboose car at that place? Yes.

"(2) Did the said James Fisher, when he arrived at Wilton, on the day when he was killed, know, or have reason to believe from his previous experience in changing cars at Wilton, that he would be obliged to go some distance west of the depot platform at Wilton in order to get upon the caboose car to proceed on his journey eastward? We cannot tell.

"(3) Was the caboose car in which said James Fisher was to go east from Wilton shown to him by one of defendant's employees in time for said Fisher to have gone to said caboose car before the train started? Yes.

"(4) Did said James Fisher know, by his experience and observation at Wilton on previous trips, that engines and cars were liable to pass along any one of the several tracks of defendant north of the depot at Wilton while the freight or stock train for the east was being made up west of the depot building? We cannot tell.

"(5) Did the said James Fisher step from the space between the tracks upon the main track of defendant's railroad, and walk lengthwise thereon, without looking to see if any engine or car might be approaching him from behind? We do not know.

"(6) If at or just before the time said James Fisher stepped upon the track, he had looked to see if an engine or car was ap-

proaching him from behind, could he have easily avoided being struck by the engine which ran over him? No."

Upon the return of the verdict and the answers to the special interrogatories the defendant objected to the answers to the interrogatories numbered 2, 4, and 5, as being insufficient, and objected to the receiving or recording of the verdict without an answer to said interrogatories. The objection was overruled.

It is insisted that if truthful answers had been made to these questions, according to the evidence, the general verdict must have been for the defendant. We do not think that if the second and fourth questions had been answered in the affirmative the answers would have been inconsistent with the general verdict. The fact that Fisher knew the place of boarding a caboose, and knew that engines and cars were liable to pass along the tracks of the railroad, would not be conclusive upon the question of his negligence.

It is insisted that the evidence conclusively shows that Fisher went upon the main track without looking to see if any engine or car might be approaching him from behind, and that therefore the answer to the fifth interrogatory should have been in the affirmative. This would not have been necessarily in conflict with the general verdict, because, as we have seen, it was for the jury to determine whether he was chargeable with negligence for not looking.

The answer to the sixth interrogatory does not appear to us to be supported by the evidence unless the jury found that "at or just before" Fisher stepped upon the track the engine was stopped at the platform to take on the two men. If he had looked, and it appeared to be standing there, he would not have seen an engine or car approaching him, and would not have apprehended the necessity of avoiding it. However this may be, an answer in the affirmative would not have controlled the general verdict, because, as we have said, it was for the jury to determine whether or not proper care and prudence required him, under all the circumstances, to look for the approach of an engine or cars.

4. Some objection is made to the refusal to give an instruction asked by defendant, and to certain instructions given by the court to the jury. We have carefully examined the questions made thereon, and, without setting them out here, we may say that we find no error in the rulings of the court in this regard. These questions involve no principle of general interest, and as this opinion has already been sufficiently extended, we must omit their discussion in detail.

We are united in the conclusion that the judgment should be affirmed.

See note, p. 123, ante.

FURMAN

v.

C., R. I. AND P. R. R. Co.

(*Adams Cas., Iowa. October* 22, 1881.)

Goods belonging to the wife, and consigned to her at Atchison, Kansas, were delivered to a carrier at Chicago by the husband, who had authority to so deliver the same and contract for their transportation. After their delivery to the carrier, they were attached in an action against the husband and taken possession of by an officer, and upon the husband going to the office of the carrier to direct a change of place of shipment, he was informed of the attachment, and after such notice had ample time to assert plaintiff's right to the goods. *Held*, that upon such showing a verdict against the carrier for failure to deliver the goods, pursuant to the contract for their carriage, should be set aside as against evidence.

APPEAL from Muscatine District Court.

Action to recover the value of certain household goods delivered to defendant at Chicago for transportation to Atchison, Kansas, which defendant has failed to deliver to plaintiff, the consignee. There was a verdict and judgment for plaintiff. Defendant appeals.

J. Carskadden, for appellant.

Brannon & Jayne and Hoffman, Pickler & Brown, for appellee.

BECK, J.—1. The petition alleges that the goods in question were delivered by plaintiff to defendant, for transportation, under a contract obligating defendant to deliver them to plaintiff at Atchison, Kansas, and that defendant has failed to deliver the goods, which have been lost to plaintiff. The answer admits the receipt of the goods, and alleges that they were seized, while in defendant's depot at Chicago, upon an attachment issued in an action against George M. Furman, the husband of plaintiff, and subsequently sold upon legal process, of which plaintiff had full notice long prior to the sale. It is also alleged that in truth the goods were the property of plaintiff's husband.

2. At the trial, after the parties had introduced evidence upon the issues raised by the pleadings, the court gave the jury the following instructions: "(5) It is in effect conceded that the goods were taken from the defendant by an officer of the law, under and by virtue of a writ of attachment against the husband of the plaintiff, substantially as alleged in the answer. If this was done without collusion of the defendant, it was not incumbent on the defendant to resist the officer, although the attachment was not against the shipper and consignee of the goods, or to contest the

claim of the plaintiff to the goods in that suit, or in any other way. But in such case the defendant, to relieve itself from liability, must, if the goods belonged to the plaintiff, show that she (the plaintiff) had actually had knowledge of the taking of the goods as aforesaid, and in time to have properly asserted her right thereto, or that the defendant gave her immediate notice thereof after the seizure. (6) This knowledge or notice may be shown by evidence, either direct or circumstantial, and may be had by or given to the plaintiff directly or through any authorized agent; but the agent in such case must be an agent in reference to the matters or things in controversy."

The following instructions were given by request of the defendant: "(1) If you find from the evidence that the husband of the plaintiff was her agent in regard to the shipment and control of the goods in controversy, then any knowledge or notice respecting the attachment of the goods in Chicago, which was given to or received by the husband, was in the eye of the law given to the plaintiff, and the legal effect of such knowledge or notice is the same as though the plaintiff had received it in person. (2) The fact that one person is the authorized agent of another may be implied or inferred from the relation of the parties, and the nature and character of the business or transaction in regard to which such agency is claimed, or the question about such agency arises. And such agency may be presumed from the prior acts of the agent in reference to the particular business in question, if such prior acts of the agent have been acquiesced in and ratified by the principal. (3) If you find that the husband of the plaintiff was her agent in regard to the household goods in controversy, as for the purpose of shipping the same by defendant's railway and receiving receipt therefor, then the defendant had a right to presume that he continued to be her agent in regard to said goods, unless notified that such agency had ceased."

Without inquiring as to the correctness of these instructions, we must regard them as the law of the case, and if it be found that the verdict is in conflict therewith the judgment must be reversed. Peterson *v.* Ochs, 40 Iowa, 501; Boyer *v.* Riley, 41 Iowa, 13. The evidence shows without conflict that plaintiff's husband acted for her in delivering the goods to defendant, and that the shipping receipt was delivered to him. Indeed, it seems that he had full authority from plaintiff to deliver the goods to defendant, and contract for their transportation to Atchison. After the delivery of the goods the husband determined to make his home in Muscatine instead of Atchison, and so advised the plaintiff, who joined him at the latter place. Prior to her arrival, and after the purpose on the part of both had been formed to establish themselves at Muscatine, the husband applied to the defendant to have the goods transported from Atchison to Muscatine, and was then informed

that they had been seized in Chicago. The law will surely recognize the husband as the wife's agent in transactions relating to the removal of their household furniture, the title whereof is in the wife. Nor can we doubt that the husband's agency for the shipment of the goods in this case extended to authorize him to change their destination. It is therefore made to appear that the husband obtained notice of the seizure of the goods while acting as an agent of plaintiff. It is shown without conflict that he endeavored to release the goods from seizure, and employed an attorney to take steps in that direction, and to contest the action in which the attachment was issued. The plaintiff or her husband, after they had notice of the attachment, had ample time to assert plaintiff's right to the goods. We are clearly of the opinion that, under the instructions, the jury should have found for defendant, and that their verdict is so in conflict with the testimony that, under the familiar rules relating thereto, it ought to have been set aside by the court below. The court, therefore, erroneously overruled the motion for a new trial based upon this ground.

3. The fifth instruction in effect directs the jury to inquire if the goods were seized by collusion upon the part of defendant. This clause of the instruction is erroneous, and ought not to have been given, for the reason that there was no evidence whatever tending to show collusion or fraud on the part of defendant.

For the errors pointed out, the judgment of the District Court must be reversed.

A. J. BUNTING *v.* C. P. R. R. Co.
M. HARRISON *v.* C. P. R. R. Co.

(*Advance Case, Nevada.*)

The Supreme Court will not review the evidence when there is a substantial conflict therein.

Where witnesses swear that they heard the ringing of the engine bell, and others swear that they were in a position to hear it if it had rung, and that they did not hear it, there is sufficient conflict in the evidence to be left to the jury.

The following instruction sustained: "The jury are instructed that is as much the duty of a railroad engineer to exercise prudence and caution in running his train, so as to avoid injury to persons crossing a track, as it is the duty of such persons to avoid contact with the train. Therefore, if they believe from the evidence that the engineer who was driving the express train on the morning of June 12, 1877, had an opportunity to see Bunting's team on the main track, and could have stopped his train with safety to the same, and to the passengers and railroad employees on same, in his then situation, and could prudently have avoided collision with the team, his failure so to stop amounts to negligence, and renders the defendant liable for damages,

and such liability attaches even though the plaintiffs contributed to the injury by their own carelessness or negligence."

OPINION by HAWLEY, J.

This is the second appeal taken in these cases. The first was an appeal by plaintiffs from a judgment of nonsuit (14 Nev. 351).

The second is taken by defendant from a judgment in favor of plaintiffs, and from an order of the district court refusing to grant a new trial.

It was correctly assumed in the argument by appellant's counsel that the law of these cases is settled by the previous decision, and that of Cohen *v.* The Eureka and Palisade R. R. Co., 14 Nev. 370.

It was also properly admitted that "the testimony offered on behalf of the plaintiffs upon the second trial was substantially identical with that offered upon the first."

Appellant, upon this appeal, admits that in the light of the former decision, the plaintiffs' testimony made out a prima facie case against the defendant; but it is claimed that, upon the whole case, the evidence is so overwhelmingly in favor of the defendant that the verdict in favor of plaintiffs ought to be set aside.

The rule, so often declared by this and other courts, that an appellate court will not set aside a verdict upon the ground of the insufficiency of the evidence, or review the weight of testimony, where there is a substantial conflict of evidence, was recognized throughout the entire argument. In this connection, it was with great energy, and an ingenious selection of portions of the testimony of several witnesses, sought to be shown that the testimony submitted on the part of the plaintiffs was so slight, negative, and indefinite, and the testimony on behalf of the defendant so strong, positive, and clear, that it ought not to be said that there is any conflict in the evidence.

In view of this argument, we have carefully read and considered all of the testimony submitted by the respective parties, and our conclusion is that upon all the material questions there is a substantial conflict in the evidence.

In determining the question whether the bell was rung or the whistle blown, we agree with the appellant that a mere "I did not hear it," is entitled to but little, if any, weight in the presence of affirmative evidence that these signals were given. But that is not, in our opinion, a fair statement of the facts in this case. The evidence amounts to more than a mere "I did not hear it." Several of the witnesses upon the part of the plaintiffs were in a position where they could and ought to have heard the signals had they been given. Some of them were looking and listening for the train, and state positively that they could have heard the usual signals if they had been given. Both of the plaintiffs swear positively

that the signals were not given. Quinn was positive no bell was rung or whistle sounded. McClelland was positive that the bell was not ringing. Buncel, Holliday, Brown, and others testify that they could have heard the bell if it had been ringing, and that they did not hear it. This, in our opinion, raises a conflict of evidence against the affirmative testimony of defendant's witnesses.

The question whether negative testimony can, in any case, have the force and effect of positive testimony, was considered by this Court in Cohen *v.* Eureka and Palisade R. R. Co., 14 Nev. 386, and it was there declared that where the witnesses were in a position to hear, their testimony that the bell was not rung "was just as positive as such testimony can ever be."

In Renuick *v.* New York C. R. R. Co., 36 N. Y. 132, the Court, in passing upon this question, said: "As some of the plaintiffs' witnesses were in a condition to hear it (the bell) if it had been rung, and were giving their attention to the train, the fact that they did not hear it is evidence conducing to prove that it was not rung. The conflict raises a question of fact, which the plaintiff had the right to have determined by the jury."

To the same effect see Byrne *v.* New York C. & H. R. R. Co., 14 Hun. 322; Dublin W. W. & R. R. Co. *v.* Slattery, 3 Appeal Cases (L. R.), 1155.

In the case last cited there were ten witnesses who testified that the whistling occurred at the proper time and in the usual way, and only three witnesses testified that, being in a position in which, if it so occurred, the sound should have reached their ears, they did not hear it. Lord O'Hagan, in giving his views upon this state of facts, said: "It is impossible not to be struck by the apparent weight of the defendant's proof. But, as was observed in the Irish Court of Common Pleas, the jury saw the witnesses, and the Judge did not condemn the verdict. And whether it was right or wrong, the jurors alone were competent, legally and constitutionally, to decide between the ten who testified on the one side and the three who testified on the other. It was urged, and the authority of an eminent Judge was vouched to sustain the suggestion, that proof of the want of hearing was no material proof at all. But this seems to me untenable. Assuming that a man stands in a certain position, and has possession of his faculties, the fact that he does not hear what would ordinarily reach the ears of a person so placed, and with such opportunities, seems to me manifestly legal evidence, which may vary in its value and persuasiveness, which may in some instances be of small account, and in others be the strongest and the only evidence possible to be offered; but, at all events, cannot be withheld from the jury; and if this be so, there was here a conflict of testimony on which the jurymen, and they alone, were competent to pronounce."

In Kansas Pacific R. R. Co. *v.* Richardson, which, in many re-

spects, was similar to the case in hand, Horton, J., in delivering the opinion of the Court, said: "Though most of this evidence on the part of the plaintiff below was of a negative character, and the company gave positive evidence of a greater number of witnesses to overcome it, still there was a sufficient conflict of evidence to raise a question of fact, which the trial Court was justified in submitting to the jury. The evidence against the giving of the signals was more, when carefully considered, than a mere 'I did not hear.' Some of these witnesses had their attention directed to the train as it came in; they were looking at the train, and were in a position to give heed to the presence or absence of the signals. The evidence conduced to prove that the signals were not properly and timely given; at least it was some evidence in that direction. The failure to give signals must be proved by witnesses that they did not hear them. When others testify that they gave them, and others testify that they did hear them, there is evidence on both sides to be considered. The evidence before the Court being sufficient to be submitted to the jury, and to be considered by them, it was sufficient to sustain a finding that proper signals of warning of the approach of the train to the crossing were not given." (The Reporter, Vol. XII, No. 16,493.)

We are of opinion that the vital question, whether plaintiffs were guilty of contributory negligence, whether they exercised ordinary care and caution, was properly left to the jury for decision, and that, inasmuch as there is a substantial conflict in the testimony offered by the respective parties, the verdict of the jury ought not to be disturbed upon the ground of the insufficiency of the evidence.

It is next urged that the Court erred in giving the first instruction asked by plaintiffs. This instruction read as follows: "The jury are instructed that it is as much the duty of a railroad engineer to exercise prudence and caution in running his train, so as to avoid injury to persons crossing a track, as it is the duty of such persons to avoid contact with the train. Therefore, if they believe from the evidence that the engineer who was driving the express train on the morning of June 12, 1877, had an opportunity to see Bunting's team on the main track, and could have stopped his train with safety to the same, and to the passengers and railroad employees on the same in his then situation, and could prudently have avoided collision with the team, his failure so to stop amounts to negligence, and renders the defendant liable for damages, and such liability attaches even though the plaintiffs contributed to the injury by their own carelessness and negligence."

The first portion of this instruction is not objected to. The latter portion is carelessly drawn and it is not as clear as it might have been made; but the principle of law embodied therein is not erroneous.

The questions ordinarily applicable to cases like this are, first, whether the damages were occasioned entirely by the negligence of the defendant; or, second, whether the plaintiffs so far contributed to the injury by their negligence or want of ordinary care and reasonable diligence, that, but for such negligence or want of ordinary care and caution on their part the accident would not have happened? In the first place, if the question was answered in the affirmative, the plaintiffs would be entitled to recover; in the second they would not; as but for their own fault the accident would not have happened. But it does not necessarily follow that the damages must have been occasioned solely by the negligence of the defendant, for if the plaintiffs were in a remote degree negligent, but their negligence was not the proximate cause of the injury, and they exercised ordinary care to avoid the injury, they would still be entitled to recover; and although the plaintiffs may not have been entirely free from fault they would, nevertheless, be entitled to recover if the defendant, in the exercise of ordinary care and caution, could have prevented the injury.

This last qualification is applied in a great variety of cases, the most frequent of which, as found in the books, is where cattle are injured upon the track of a railroad and where the engineer of the train could after seeing them, by the use of ordinary care upon his part have avoided the injury; but it is proper to be given in all cases where there is any testimony tending to show that the defendant was guilty of gross or wilful negligence.

The views we have expressed upon this point are sustained by abundant authority. (Butterfield *v.* Forrester, 11 East. 60; Bridge *v.* The Grand Junction R. R. Co., 3 M. & W. (ex ch.) 244; Davies *v.* Mann, 10 M. & W. (ex ch.) 545; Tuff *v.* Warman, 94 Eng. Com. Law, 584; Bradley *v.* London & N. W. R. R. Co., 1 Law Rep. (appeal cases) 759; Solen *v.* V. & T. R. R. Co., 13 Nev. 106; Kansas Pacific R. R. Co. *v.* Pointer, 14 Kan. 37; Morrison *v.* The Wiggins Ferry Company, 43 Mo. 383; Brown *v.* The Hannibal and St. Joseph R. R. Co., 50 Mo. 465; Kerwhaker *v.* Cleveland C. & C. R. R. Co., 3 Ohio St. 172; Northern Central R. R. Co. *v.* Price, 29 Md. 437; Baltimore & Ohio R. R. Co. *v.* Dougherty, 36 Md. 368; Wharton on Negligence, Sec. 388; Shearman & Redfield on Negligence, Secs. 36, 493.)

The important question presented by the testimony was whether the plaintiffs exercised ordinary care and caution, and the principal objection urged by appellant's counsel to the instruction is, that it was not applicable to any evidence in the case.

We are, however, of the opinion that there was some evidence that justified the giving of a proper instruction upon this point.

There was testimony offered by both parties as to the distance within which the train might have been safely stopped. Kemp,

a witness for plaintiffs, testified that a train running at the rate of twenty miles an hour could be safely stopped by the use of air brakes, in 125 yards; that if the train was stopped in 225 feet it would indicate a speed of about twelve miles an hour. The testimony upon the part of the defendant tended to show that the train was stopped within a distance of about 250 feet.

It is true that this testimony was offered for the purpose of showing the rate of speed at which the train was moving. But it is not improper to consider it with reference to another branch of the case. The defendant, for the purpose of showing that plaintiffs did not exercise ordinary care, introduced several witnesses whose testimony tended to show that the obstructions upon and along the north side track did not prevent the plaintiffs from seeing defendant's train at distances varying, as they approached the main track, from one hundred to five hundred feet, in ample time, after arriving at the north side track, to have stopped their team if they had been looking in that direction, and thereby have avoided the injury.

This testimony, like the edges of a sword, cuts both ways. While it tended to prove a want of care upon the part of plaintiffs, it also tended in another direction to prove gross negligence on the part of the defendant. There was a decided conflict of evidence upon this point. If the jury believed the testimony upon the part of the defendant it would have been their duty to determine whether the engineer of the train, had he been keeping a reasonable lookout, as it was his duty to do, could not have seen the horses attached to plaintiffs' wagon before, or at least as soon as the plaintiffs could have seen the train; and in view of this testimony it was, perhaps, proper for plaintiffs to ask the Court to submit to the jury the question whether the defendant's engineer could not, by the exercise of ordinary care and caution after discovering plaintiff's team, have lessened the speed or stopped the train with safety, in time to have avoided the collision.

We are free to confess that we do not think it was necessary to introduce this element of gross or wilful negligence into the case; but we are unwilling to say that there was no evidence to which the instruction might apply. The fact is that the testimony of the defendant's engineer, evidently offered for the purpose of showing that he was not at fault as might be inferred from the testimony of other witnesses, tended to support the plaintiffs' theory that the obstructions on and along the north side of the track prevented them from seeing the train in time to avoid the collision. This engineer testified that he was sitting in his usual place, looking ahead, and that he did not see the horses until the locomotive was right on to them, and that it was impossible for him to have checked the speed of the train, or stopped it in time to prevent the collision.

But even if we should concede that the instruction was to some extent inapplicable to the facts, it would not necessarily follow that the judgment should be reversed, certainly not, if it is apparent from a consideration of all the instructions that the jury could not have been misled thereby.

It is argued by appellant's counsel that the instruction is contradictory to and inconsistent with instruction No. 4, given by the Court of its own motion, as follows:

"If you should believe from the evidence that the defendant was guilty of culpable negligence in running its train of cars into Reno on the morning of the 12th June, A.D. 1877, nevertheless the plaintiffs cannot recover, if they could have avoided the injury by the exercise of ordinary care."

If these were the only instructions given, the objection would have more force. But from an inspection of the record, it clearly appears that instruction No. 4 was given upon the theory that if plaintiffs' negligence was the proximate cause of the injury they could not recover, and that the jurors, as reasonable men, must have so understood it, and that the instruction given at the request of plaintiffs introduced another and different element for their consideration.

In Radley *v.* London and N. W. R. R. Co., supra, Lord Penzance said that the law in these cases of negligence was well settled. "The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely: that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet, if the defendant could, in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him."

In Brown *v.* The Hannibal and St. Joseph R. R. Co., supra, the lower court instructed the jury as follows: "Even if the jury should believe from the evidence that the plaintiff was guilty of negligence or carelessness which contributed to the injury, yet if they further believe from the evidence that the agents or servants of defendant, managing the locomotives or machinery of the defendant with which the injury was inflicted, might have avoided the said injury by the use of ordinary care and caution, the jury will find for plaintiff."

The Supreme Court said that this instruction was "entirely unobjectionable." In that case, as well as in this, it was argued that the negligence on the part of the plaintiff was "unaccountable and inexcusable," and that her carelessness was entirely

inconsistent with the right to recover damages "founded on the negligence of the defendant."

The rule is well settled that all the instructions must be considered together, in order to determine whether or not the jury may have been misled. In the present case the jury were repeatedly told, in the instructions of the Court, that if they believed from the evidence that the plaintiffs did not exercise ordinary care and diligence, or that their negligence was the proximate cause of the injury, they were not entitled to recover, although the defendant was negligent, in not ringing its bell or blowing its whistle, or running its train at an unusual fast rate of speed. This principle was presented in every imaginable form, at great length, as strongly in favor of the defendant as the law would warrant.

We quote but one instruction, in addition to No. 4, among the many that were given, to illustrate the general principle announced by the Court:

"Even though the jury may find that the defendant-corporation did not on the occasion of the accident in all respects, or in any respect, fulfil any obligation it was under in giving usual and ordinary signals of its approach, so as to warn passers of the approach of its train, yet that circumstance, or those circumstances, does not and do not shield the plaintiffs from the exercise of ordinary care and prudence on their part. The fact, if the jury shall so find it, that the train of the defendant-corporation approached the crossing of Sierra Street without blowing any whistle, where the whistle had usually been blown theretofore, and without ringing any bell, does not of itself authorize the plaintiffs to recover damages, if the plaintiffs, notwithstanding the negligence of the railroad company, recklessly exposed themselves to danger; and if it appears to the jury that the injury complained of would not have occurred but for their own misconduct or negligence, they cannot recover damages, but must bear the consequences of their own folly."

All that was said by the Court, as to the right of the plaintiffs to recover is embraced in the following language: "If you shall be of the opinion after a full, fair, candid, and unprejudiced review of all the testimony given on behalf of the respective parties, that on the day and year and at the place alleged in the complaint, the plaintiffs, while exercising that due care which a reasonably prudent man under the circumstances of the case would exercise, were injured and their property destroyed by being run into by the train of the defendant, and that the collision was wholly caused by the neglect and carelessness of the defendant-corporation, or that after discovering the plaintiffs upon the track, the defendant could have avoided the collision by the exercise of proper care, then the plaintiffs are entitled to a verdict, and not otherwise."

We think it is manifest that the instruction given by the Court,

as well as some portions of the evidence, authorized the plaintiffs to ask and the Court to give the instructions complained of; and that, in any event, it is apparent from a careful consideration of all the instructions given that the jury could not have been misled to the prejudice of the defendant as to the law of the case.

The judgment of the District Court in each case is affirmed.

I concur: Leonard, C. J.

DISSENTING OPINION.

The first instruction, which is fully set forth in the opinion of the Court, charged the jury that if the engineer of the colliding train could, with safety to the passengers and property in his charge, have stopped his train and thereby "have avoided collision with the team his failure so to stop amounts to negligence and rendered the defendant liable, . . . and much liability attaches even though the plaintiffs contributed to the injury by their own carelessness or negligence."

It is a general principle of the law of negligence that a plaintiff cannot recover damages for injuries to which himself has contributed. In order, however, to bar a recovery the negligence of the plaintiff must be the proximate cause of the injury; it must be negligence occurring at the time the injury happened. If the defendant, after becoming aware of plaintiff's danger, could have avoided the injury by the exercise of ordinary care, an action may be sustained, notwithstanding plaintiff may have been remotely negligent in exposing himself to such danger.

It was therefore held in the case of Davies *v.* Mann, 10 M. and W. 547, the leading case upon the subject of negligence in a plaintiff which will not disentitle him to recover, that the plaintiff could recover notwithstanding he had negligently left his donkey to graze upon the highway with its forefeet so fettered as to be unable to get out of the way of passing wagons, and while so situated was killed by the negligent act of defendant in driving his horse and wagon against it. The Court based its decision upon the ground that the mere fact of negligence on the part of the plaintiff in leaving his donkey upon the public highway was no answer to the action, unless the donkey's being there was the immediate cause of the injury; but that, if the immediate cause of the injury was the negligent and too rapid driving of defendant's servant, plaintiff could recover. "For, although the ass may have been unlawfully there," said the Court, "still the defendant was obliged to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

This subject was considered and the doctrine well stated in B. and O. R. R. Co. *v.* Trainor, 33 Md. 542, a case in which plaintiff's intestate was killed in walking upon a railroad track.

Said the Court: "It is argued that if the deceased walked on the track, and his walking on the track was want of ordinary care, and the accident would not have happened if he had not walked on the track, then such walking was the proximate cause of the accident and the plaintiff cannot recover. . . . By 'proximate cause' is intended an act which directly produced, or concurred directly in producing, the injury. By 'remote cause' is intended that which may have happened, and yet no injury have occurred, notwithstanding that no injury could have occurred if it had not happened. No man would ever have been killed on a railway, if he had never gone on or near the track. But if a man does, imprudently and incautiously, go on a railroad track, and is killed or injured by a train of cars, the company is responsible, unless it has used reasonable care and caution to avoid it, provided the circumstances were not such, when the party went on the track, as to threaten direct injury, and provided that being on the track he did nothing positive, or negative, to contribute to the immediate injury."

It has accordingly been held that if the owner of cattle suffer them to range at large, and they stray upon a railway track and are run over by passing cars, such owners may recover damages if the injury could have been avoided by the exercise of ordinary care upon the part of the railroad engineer.

In the class to which cases of this nature belong (and many of them are cited in the opinion of the Court) it will be observed that the plaintiff has been guilty of some degree of negligence touching his person or property, but such negligence was the remote and not the proximate cause of the injury. In such cases it is well settled that a recovery may be had.

An examination of the facts of this case, however, has convinced me that the general doctrine under consideration (and which I cannot admit was correctly expressed in the instruction) was inapplicable and misleading.

Here are the facts: Upon the morning of the accident the plaintiffs were driving two horses before an open wagon in a southerly direction along Sierra Street, a public street in the town of Reno, crossed at right angles by defendant's railroad track.

In attempting to cross the track the wagon was struck by a train of cars approaching from the west, and plaintiffs injured in their persons and property as complained of.

Plaintiff's theory that as they approached the crossing their view of the main track and of the colliding train moving upon it was obstructed, not only by buildings along the west line of Sierra Street, but by passenger and box cars upon a side track, and quan-

tities of wood unloaded from defendant's cars. They showed that the train approached the crossing where the collision took place upon a descending grade, at a high rate of speed, and claimed that it gave no warning by bell or whistle of its approach.

From these facts I conclude that no question of remote negligence was or could have been presented.

If plaintiffs were negligent at all, such negligence arose from their failure to listen for signals of the approaching train, or to have seen the approach of the train, if that were possible, in time to have avoided the collision. But if they neglected to exercise ordinary caution and were negligent, their negligence occurred at the time of the accident. Such negligence, if it existed, was the proximate cause of the injury, and would defeat a recovery under all of the authorities. And it is equally well settled that, if the negligence was mutual, and the negligence of each party was the proximate cause of the injury, no action can be sustained.

In justification of the instruction it is said that some testimony was introduced by defendant tending to show that plaintiffs could have seen the approaching train in time to have avoided the collision, and that, if this were so, such testimony at the same time proved that the engineer could have seen the plaintiffs and avoided the accident. If it be conceded that the engineer could have seen plaintiffs in time to have avoided the accident, it must be admitted that plaintiffs could have seen the approach of the train. If they did not see it when they could have seen it, or seeing it assumed the hazard of crossing, they were alike guilty of contributory negligence.

Nor was the error in this portion of the charge nullified by the giving of other instructions upon the subject of contributory negligence favorable to appellant. It was as much the duty of the jury to obey the instruction that was incorrect as it was their duty to obey the correct instructions. As the instructions were irreconcilably conflicting the jury may have been misled.

For these reasons I think the judgment and order of the District Court should be reversed.

Belknap, J.

GEORGE HARVEY, Appellant,

v.

TERRE HAUTE AND INDIANAPOLIS R. R. Co., Respondent.

(*Advance Case, Missouri. February*, 1882.)

A common carrier cannot contract for exemption from liability on account of the negligence of itself or its servants.

Where the shipper fixes a stated value upon the article shipped he cannot recover a larger amount.

APPEAL from the St. Louis Court of Appeals.

George W. Cline and Joseph Dickson, for appellant.

Pattison and Crane, for respondent, cited Shultz *v.* Pacific R. R. Co., 36 Mo. 17; Maher *v.* Atlantic, etc., R. R. Co., 64 Mo. 267; Holman *v.* Chicago, etc., R. R. Co., 62 Mo. 562; McBroom *v.* Putney, 28 Ind. 353; Clark *v.* St. Louis, etc., R. R. Co., 64 Mo. 440; Louisville, etc., R. R. Co. *v.* Hedger, 9 Bus. L. 645; Farnham *v.* R. R. Co., 55 Pa. St. 53; Patterson *v.* Clyde, 67 Pa. St. 500; Lamb *v.* R. R. Co., 46 N. Y. 271; Sager *v.* R. R. Co., 31 Me. 239; French *v.* R. R. Co., 41 N. Y. 108; Bankard *v.* Baltimore, etc., R. R. Co., 34 Md. 197; Adams Ex. Co. *v.* Shaipless, 77 Pa. St. 516; Crafter *v.* R. R. Co., 1 Com. Pl., L. R. 300; Murray *v.* Met. Dist. R. R. Co., 27 L. T. N. S. 762; Read *v.* R. R. Co., 60 Mo. 199; Chippendale *v.* L. & Y. R. R. Co., 21 L. J., Q. B. 22; Great Northern R. R. Co. *v.* Morrille, 21 L. J., Q. B. 319; Austin *v.* M. S. & L. R. R. Co., 10 C. B. 454; Alexander *v.* Green, 7 Hill, 533; Kimball *v.* Rutland, etc., R. R. Co., 26 Vt. 256; Porter *v.* Raymond, 53 N. H. 519; Putnam *v.* Wylie, 8 Johns. Rep. 432; Swift *v.* Mosely, 10 Vt. 208; Walahier *v.* R. R. Co., 71 Mo. 514; Batson *v.* Donovan, 4 Bain & Ald. 21; Wolf *v.* Am. Ex. Co., 43 Mo. 421; Relf *v.* Rapp, 3 W. & S. 21; Orange Co. Bank *v.* Brown, 9 Wend. 116; Story on Bailm. (8th ed.) Sec. 565; Angell on Carriers (4th ed.), Sec. 258; Elkins *v.* Empire Trans. Co., Weekly N. of C., Vol. 2, p. 403; Kallman *v.* U. S. Ex. Co., 3 Kan. 205; Angell on Car., secs. 258, 261 (4th ed.); Richards *v.* Westcott, 2 Bosw. 604; Smith Lead. Cases (pt. 1), 390 and cases there cited; Little *v.* B. & M. R. R. Co., 66 Me. 239; Philips *v.* Earles, 8 Pick. 182; Boscowitz *v.* Adams Ex. Co., 93 Ill. 523; Adams Ex. Co. *v.* Stettaners, 61 Ill. 187; Hait *v.* Penn. R. R. Co., 7 Fed. Rept. 630; Kemper *v.* South. Ex. Co., 22 La. Ann. 158; Southern Ex. Co. *v.* Cook, 44 Ala. 468; Green *v.* Southern Ex. Co., 45 Ga. 305; Everet *v.* Same, 46 Ga. 303; Baldwin *v.* Steamship Co., 74 N. Y. 125; Redfield on R. R. (5th ed.) 120; Mather

v. Ex. Co., 9 Reporter, 430; Lawson on Carriers, 20; R. R. Co. v. Fraloff, 100 U. S. 24; Lewis v. R. R. Co., 3 L. R., Q. B., Div. 195, 5 Rep. 383; McCance v. R. R. Co., 7 H. & N. 477, 31 L. J. Exch. 65; Smith v. N. Y. Cent. R. R. Co., 29 Barb. 139; Clark v. R. & S. R. R. Co., 14 N. Y. 570, 575; Newark v. Insurance Co., 30 Mo. 160; Wagner v. Jacob, 26 Mo. 530; Milwaukee, etc., R. R. v. Kellog, 94 U. S. 472.

HOUGH, J.—This was an action brought by appellant in the St. Louis Circuit Court upon a special contract for the transportation of a trotting horse from East St. Louis to Philadelphia.

This contract was entered into by and between the respondent, by one Bacon, its station agent, and William T. Dickson, of Philadelphia, and contained an agreement on the part of respondent to transport a horse for said Dickson from East St. Louis to Philadelphia at reduced rates; and an agreement on the part of said Dickson that in consideration of such reduced rates, he would assume certain risks; it further provided for passing free the person in charge of the horse; that the horse was to be carried at the owner's risk, and his value if injured or killed was $100.

The petition alleges that respondent is a corporation organized under the laws of Illinois, but does not allege that it is a common carrier, nor what business it was organized to carry on, nor what it was carrying on at the date of the contract. It also alleges that the horse was a "trotting horse worth $10,000," that he belonged to plaintiff (appellant here), and that William T. Dickson who executed the contract was his agent; that the horse was placed by respondent in a defective and unsound car, and that respondent's agents and servants were careless and negligent in the management of the road and trains, and that by reason thereof the horse was injured to plaintiff's damage in the sum of $11,000. The answer puts in issue the ownership of the horse and its value, admits the execution of the contract, but alleges that it was made with Dickson, who represented that the horse belonged to him, and that he was acting for himself, and denies the other allegations of the petition.

As an affirmative defence it sets forth the following facts: That respondent had certain regular rates for the transportation of horses of ordinary value, and that for horses of greater value five per cent on the owner's valuation was charged in addition; that when this horse was offered for transportation, the agent of the respondent asked his value, and was told that it was $100; that thereupon Dickson and the agent of the respondent agreed upon that as the valuation and the contract was drawn up and signed by both parties, which contained among its provisions the words: "owner's risk, value if injured or killed $100;" and alleged that respondent if liable at all, was liable for only $100. The new matter in the answer was

put in issue by the reply. The evidence of plaintiff tended to show that he was the owner of the horse; that he was worth at the time of shipment $8000 to $12,000; that his value consisted in his record made at races; that he was injured during his transit to Philadelphia so as to make him worthless as a race horse, and not worth more than $60 to $100 for any purpose. The value put upon him was designated in the testimony of one of plaintiff's witnesses as a "fancy value." Dickson testified that he executed the contract sued on but that he did it as the agent of appellant; that his agency rose out of a contract between him and appellant which is as follows: "This agreement made and entered into this 17th day of Nov., 1874, by and between Geo. Harvey of Bunker Hill, State of Illinois, party of the first part, and William T. Dickson of St. Louis, State of Missouri, party of the second part; Witnesseth, that whereas the said Geo. Harvey is owner of a bay trotting gelding by the name of "Nino," and is desirous of placing him under the care, control and management of said William T. Dickson for one year, to be kept and trained by him for that time, with the privilege of entering and trotting said horse in any place Dickson might think best during that period; it is mutually agreed and understood by and between the parties, as follows, to wit:

"That said Dickson shall take and keep possession of said horse from this date for the full term of one year; that during said time he shall have exclusive management, charge and control over him, with the privilege of trotting him at whatever place or places he may deem best or decide upon, free from any interference by the said Harvey; that he shall during that time keep a just and true account of all expenses of whatever kind incurred and paid by him for the care, attendance and keeping of said horse, entrance fees, travelling expenses, including the board and travelling expenses of said Dickson when he shall go with said horse, etc.; also all moneys received on account of races run by said horse during that time, or moneys received on his account from any source; that after deducting all the expenses aforesaid, the balance shall be equally divided between the parties hereto, and the amount found due and owing to said Harvey shall be paid him at the expiration of said term, and the said horse returned unless otherwise agreed between them.

"In testimony whereof the said parties have hereunto set their hands and seals the day and year aforesaid.

"(Signed) GEORGE HARVEY. [Seal.]
"WM. T. DICKSON. [Seal.]"

"It is further agreed between the parties that said Geo. Harvey shall have the privilege of selling said horse at any time he may see fit; but in such case two disinterested parties are to be chosen by said Dickson and said Harvey, and in case these arbitrators fail

to agree they shall choose a third party, and they shall agree also as to the amount of damages done said Dickson by reason of said horse being sold, and said Harvey shall pay said Dickson said amount agreed upon by said arbitrators.

"(Signed) GEORGE HARVEY. [Seal.]
"WILLIAM T. DICKSON. [Seal.]"

Testimony was offered by the plaintiff for the purpose of showing negligence on the part of the servants of the defendant in the management of the train, resulting in injury to the horse.

Respondent introduced testimony tending to disprove negligence on its part, and tending to show that all possible care and diligence was exercised by respondent's agents in the transportation of the horse. It also introduced testimony tending to prove all the allegations of its answer, consisting an affirmative defence.

The following instructions asked by the defendant, as to the measure of damages, were refused by the court:

"2. The jury are instructed that if they believe that defendant's regular rate of transportation for horses from East St. Louis to Philadelphia, Pennsylvania, were $1.64 per 100 pounds for horses of the value of one hundred dollars, and that for horses of greater value the defendant's rate was five per cent on the owner's valuation in addition to said $1.64 per 100 pounds; that defendant's agent made known these terms to William T. Dickson at the time he offered said horse for transportation; that the horse at that time belonged to plaintiff; that when said Dickson was informed of said rate he told the agent of the defendant that said horse was worth $100, and that on the basis of such valuation, the agent of the defendant agreed to transport said horse to Philadelphia for the sum of $1.64 for each 100 pounds of his weight, or the total sum of $32.80; that on the margin of the written contract for such transportation entered into between defendant and said Dickson the value of said horse was stated to be $100; then if the jury find that defendant is liable to plaintiff at all in this suit, they will assess his damages at a sum not exceeding $100, and interest from date of suit at six per cent per annum.

"3. The jury are instructed that if Dickson intentionally misrepresented the value of said horse and stated his value to be much lower than it actually was for the purpose of procuring him to be transported at a lower rate than he would otherwise have been carried for, the plaintiff is entitled to recover only the value fixed by Dickson."

The jury rendered a verdict in favor of appellant here for $4165, upon which the Circuit Court rendered judgment, and respondent here took the case by appeal to the St. Louis Court of Appeals. That court reversed the judgment of the Circuit Court, and plaintiff brings the case here by appeal.

We are all of the opinion that instructions numbered 2 and 3 asked by the defendant and refused by the court, should have been given, conceding the right of the plaintiff to maintain an action on the contract.

This court has repeatedly held that public policy will not permit a common carrier to contract for exemption from liability on account of the negligence of itself or its servants. The plaintiff contends that it is as much against the policy of the law to permit the carrier to limit its liability to a part of the loss, as it would be to permit it to stipulate against the entire loss. We do not regard a contract limiting a right of recovery to a sum expressly agreed upon by the parties as representing the true value of the property shipped as a contract in any degree exempting the carrier from the consequences of its own negligence. Such a contract fairly entered into leaves the carrier responsible for its negligence, and simply fixes the rate of freight and liquidates the damages. This we think it is competent for the carrier to do.

And where the reduced value is voluntarily fixed by the shipper with a view of obtaining a low rate of freight without any knowledge on the part of the carrier, that the property was of greater value, it would be a fraud upon the carrier to permit the shipper to recover a greater sum than that fixed by him. Hart *v.* Penn. R. R. Co., 7 Fed. Rep. 630. Lawson on Carriers, section 20.

A majority of judges are of opinion that the plaintiff has no right of action upon the contract sued on. That by the terms of the contract between Dickson and the plaintiff, Harvey, Dickson had the exclusive right of possession of the horse injured, and held such possession for himself and not as agent for the plaintiff, and the contract for transportation made by Dickson with the defendant cannot be adopted by the plaintiff and sued on by him, as a contract made by him or for him, through Dickson as his agent.

Judge Norton entertains a different view of the effect of this contract.

The judgment of the Court of Appeals reversing the judgment of the Circuit Court will for the reasons given be affirmed.

See Hart *v.* Pennsylvania R. R. Co., 1 Am. and Eng. R. R. Cas. 615.

WELLS

v.

AMERICAN EXPRESS CO.

(*Advance Case. Wisconsin, February* 7, 1882.)

The true owner of personal property may enforce his right to it as against the consignor or consignee or carrier, or other bailor or bailee, whenever he sees fit to do so, before its delivery to the bailee as directed by the bailor.

A package of money belonging to W. alone was sent by express directed to W. & C., and, upon W.'s demanding it as sole owner, without any assignment by C. of his apparent interest to W., or written order by C. to deliver to W., or offer of any receipt or acquittance from both, the express company refused to deliver it to W., claiming that the money had been subjected to process of garnishment in its hands. *Held*, that apart from the question of garnishment, W. may recover the full amount of such moneys.

In the statutory proceeding by garnishment, in justice's court, jurisdiction must appear affirmatively from the record, and where that fails to show the affidavit required by the statute as the foundation of the proceeding, neither a docket entry that an affidavit was made and filed (not showing its contents), nor an appearance and submission to the court by the garnishee, can give validity to the judgment.

The propriety of allowing an amendment of the complaint herein after the first trial, in disregard of a stipulation between the parties on the first trial, is res adjudicata by the decision of this court on a former appeal—49 Wis. 224—although that decision was rendered under a misapprehension of the facts.

Although the cause of action in the complaint, as last amended, is independent of the transactions between the parties and others in respect to the shipping and consignment of furniture, and the collection, upon the bill therefor, by defendant's agent, of the moneys consigned to W. & C., those facts were properly admitted in evidence to show W.'s exclusive ownership of the moneys so consigned.

APPEAL from circuit court, Racine County.

Fish & Dodge, for respondent. Finches, Lynde & Miller, for appellant.

ORTON, J.—In this case, reported in 49 Wis. 224, it was held that the amended complaint, on which the action was last tried, was for money had and received, and substantially charged that the money was the property of the plaintiff, and that, notwithstanding the former complaint set out the contract of consignment, the amendment was proper. The action under the amended complaint is not, therefore, based upon the terms of the contract of consignment; and the finding that the defendant received the money to the use of the plaintiff, although strictly contradictory to the contract and the direction of the package, may not only be true, but warranted by the pleadings. When the cause was before

this court, as reported in 44 Wis. 324, it did not appear from the evidence that the money belonged exclusively to the plaintiff, and it did appear that it belonged to Wells and Cartright jointly, and that, therefore, the package was properly directed to them both. But it now appears from the evidence, and the circuit court has so found, that the money was the property of the plaintiff alone, as alleged in the amended complaint, and the circuit court rendered judgment in favor of the plaintiff alone, virtually holding that, notwithstanding the package was consigned to Wells and Cartright jointly, and so directed, the company was liable to Wells alone as the real and exclusive owner of the money, and could not defend against his right on the ground that the package was otherwise directed. This is a very important question, and one which has not before been decided by this court, so far as I can find.

In respect to the manner in which the package was made up and directed by Downs, the consignor, the evidence is the same as on the former trial, that the package was directed jointly to the plaintiff and one Cartright by the partnership designation of "Wells & Cartright." There was no assignment by Cartright of his apparent interest in the package to Wells, and no written order by Cartright to deliver to Wells, and no offer of any receipt or acquittance from both. There was a verbal demand by Wells, and a verbal statement by Cartright that Wells owned the money. The defendant refused, under such circumstances, to deliver to Wells alone, and insisted also that the money had been subjected to garnishee proceedings against Cartright. Irrespective of the garnishment, the first and important question arises, whether the plaintiff alone can recover this money upon proof of his individual and exclusive ownership of it in disregard of the directions of the consignor. The question is the same as if a third person had claimed the package as against the consignees or the person to whom it was directed.

As a general principle it is unquestionably the law, as stated by the authorities cited by the learned counsel of the appellant, "that it is the duty of the company to make personal delivery in accordance with the address on the package; and if it is delivered elsewhere than as addressed, or to the wrong person, the company is liable for the consequent loss." In this case the delivery of the package to "Wells & Cartright," the consignees, and to whom it was addressed, or to either of them for both, would have been a proper, and only proper, delivery under the operation of this general principle. But to this general rule of law there are exceptions, one of which is that the true owner of the property may enforce his right to it as against the consignor or consignees or the carrier, or against the bailor or bailee, whenever he sees fit so to do, before its delivery as directed. His right is paramount to the claim of all others, no matter what may be their relations to each

other, unless it is lost, or, for the time being, suspended by his own conduct of surrender or estoppel. The terms of the contract of consignment, and the directions of the consignor, and the address upon the package, are all subject to the jus tertii whenever it is sought to be so enforced.

The exception, as stated by Browne, "Law of Carriers," 221, is that "the bailee must not give up the goods which actually belong to a third person, if he have notice of the fact, to the person who bailed them to him;" or, as stated by Mr. Redfield, C. & B. § 318, "otherwise he would pay in his own wrong if it should turn out the property was in another, since the contract by construction is with the party entitled to claim the goods;" or, as it is held in Ogle *v.* Atkinson, 5 Taunt. 759, "a warehouseman receiving goods from a consignee who has had actual possession of them, to be kept for his use, may, nevertheless, refuse to redeliver them if they are the property of another and the latter prohibits the redelivery." This statement of the law is disapproved by Ang. Carr. § 355, based upon an intimation in the late editions of Story, Bailm., differing from the view of that learned author as expressed in his first work on that subject. But this principle is recognized by all the other elementary works on this subject as being established by the great weight of authority.

This change of opinion upon the question by Mr. Justice Story is fully considered by Mr. Justice Willes in the leading case of Sheridan *v.* New Quay Co., 4 C. B. (N. S.) or 93 Eng. C. L. 617, and the first opinion of our learned author is approved. Perhaps it would not be proper to say that Mr. Angell fully disapproved of this principle, for the reason he gives for differing from the opinion in Ogle *v.* Atkinson does not really touch the question, for he says: "But this doctrine seems now to be untenable, and it is said that, in general, an agent has no right to set up an adverse title against that of his principal," etc. This reason does not militate against the principle above stated, for it is not claimed that the bailor can "set up;" or, in other words, of his own motion, claim the property for a third person as the real owner.

Mr. Hutchinson, in his work on Carriers, § 405, says: "And if the carrier or other bailee, while still holding possession of the property, would defend against the claim of his bailor by setting up the paramount title of another, he must at least show that it is done by his authority and in his behalf, otherwise the bailee might avail himself of the title of a third person which might never be asserted by such person, and thus be enabled to keep the property for himself without a shadow of title, when by his contract he had undertaken to return to the bailor or to deliver it according to his directions." The learned author, after thus admitting the reason which seems to have changed the view of Mr. Justice Story on the main question, proceeds to state the principle as follows: "But

while it is not enough that the carrier has become aware of the title or claim of a person other than the bailor or consignee to enable him to set up such claim or title against the demand of the latter, yet if he has been notified by the claimant of his title, and has been requested not to deliver the goods according to his undertaking, he would no doubt be permitted, in an action against him by the bailor or consignee, to prove that such claimant was entitled to the goods, and had forbidden their delivery to the bailor, or according to his directions."

This statement of the principle embraces the present case most fully, for here the individual claimant, Wells, has not only claimed this package of money as his exclusive property, but has demanded it, and now brought this suit under the amended complaint for it as so much money had and received by the defendant company to his use as the real owner. It is admitted by all of the courts and by the elementary writers that it becomes a difficult question for the bailee or carrier to determine as to whether he should deliver the consignment or deposit according to the strict terms of his contract, or to the claimant, and that his position is perilous, but he must act at his own risk. It is suggested by the English authorities that he may protect himself by a bill of interpleader, in which the rights of all of the parties may be determined. But, in the present case, no such embarrassment exists, for the claimant, as the real owner, has brought his suit for the express purpose of proving his title and of obtaining the money.

When the liability of the express company to respond to the claim of a third person as the exclusive owner of the property against the terms or directions of the consignment for delivery to another, or for delivery to himself and another, is established by law, as now seems clear, it follows that such third person should recover in an action against the company upon proof of his ownership. It may be that such judgment would not be a bar against the suit of the other consignee or the consignor, because they are not made parties to the suit, but the evidence of the plaintiff's title has been furnished to the carrier, which, in an action by either, would be sufficient protection. But the difficulty and embarrassment of the carrier in such case do not operate against the principle that the real owner of the money has a right to recover it before it passes beyond his reach, by delivery to the one who does not own it, although he may be named as the consignee.

This principle obtains in all cases of bailment, and the jus tertii may be enforced even as against the contract of bailment, and, when enforced, will be made available to excuse and protect the bailee from performance or delivery according to its terms; and it is founded in reason, as well as sustained by a great preponderance of authority. There can be no distinction between its application in case the bailor or consignor seeks to reclaim the property from

the bailee or carrier and in case the consignee seeks its delivery; for the rights of all of the parties to the contract must yield to the paramount right of the real owner of the property.

In Sheridan *v.* New Quay Co. supra, it is said: "The defendants were common carriers, and therefore bound to receive the goods for carriage. They could make no inquiry as to ownership. They have not voluntarily raised the question; it was raised by the demand of the real owner, before the defendants had parted with the goods." Upon the facts and findings in this case, this language is especially appropriate and authoritative.

This doctrine was denied by the earlier authorities, and it was held that if the bailee deliver the goods to the real owner, yet he shall be chargeable to the bailor (Rolle, Abr. 606, tit. "Detinue;"), and it is yet denied by many respectable authorities, but it is approved by nearly all of the text writers, and by the great weight and number of judicial decisions. Hardman *v.* Willcock, 9 Bing. 382; Cheesman *v.* Exall, 6 Exch. 341; Wilson *v.* Anderton, 1 B. & Ad. 450; Dixon *v.* Yates, 5 B. & Ad. 340; Taylor *v.* Plumer, 3 M. & S. 362; Patterson *v.* Robinson, 5 M. & S. 105; Bidde *v.* Band, 34 Law J. Q. B. 137; Thorne *v.* Tilbury, 3 H. & N. 534; Blivin *v.* Hudson River R. R. Co. 35 Barb. 188; Bates *v.* Stanton, 1 Duer, 79; Rogers *v.* Weir, 34 N. Y. 463; Western Transportation Co. *v.* Barber, 56 N. Y. 544; Floyd *v.* Bovard, 6 W. & S. 75; King *v.* Richards, 6 Whart. 418; Lawrence *v.* Berry, 19 Ala. 130; Rosenfield *v.* Express Co. 1 Woods, 131; The Idaho, 93 U. S. 575; American Express Co. *v.* Greenholgh, 80 Ill. 68.

It is quite clear, from the evidence on this last trial, that the wagons which were purchased and received by Downs, the consignor, belonged to the plaintiff alone, and that Cartright had no interest in them, and that the money ought to have been consigned to him alone, instead of to him and Cartright jointly. After its arrival the plaintiff, through his agent, claimed this package as belonging to him exclusively, and the agent of the defendant was informed by both the consignees that the money belonged to the plaintiff alone, and the plaintiff demanded it of the defendant. The case is, therefore, brought clearly within the above principle, and the plaintiff is entitled to recover unless something was done which was tantamount to a delivery of the money to Cartright before this claim of the plaintiff was set up and demand made by him for it as his own property, exclusive of Cartright. This leads to the question whether this money had been subjected to the garnishment of the defendant in cases or on judgments against Cartright, before this claim and demand of the plaintiff for all of the money as his own, which is the only pretence of its delivery to the consignees.

It seems that, when this case was tried before, there was a stipulation of the parties that such proceedings of garnishment were

valid and regular, and waiving the record evidence thereof; but before the last trial the circuit court made an order allowing the plaintiff to amend his complaint, and to withdraw that stipulation, and that order was affirmed by this court. 49 Wis. 224. In the opinion of the present chief justice in the case it was said: "If the dockets of the justices who rendered these judgments were actually deposited in court, there was no hardship in requiring the defendant to resort to them to prove its defence." This language would seem to imply that it was supposed that the records deposited in court were sufficient to prove all that was admitted in the stipulation, as to the validity of the garnishee proceedings, by which this money was taken from the defendant; and this court evidently acted upon such supposition, and was not informed otherwise. If it now appears that those records are not sufficient to show what that stipulation admitted, it may be the misfortune and hardship of the defendant, but it is not perceived how it can now be remedied.

Had this court been informed that such records would not show the facts so admitted in the stipulation, the decision in respect to it might have been different, and that such fact did not appear was not the fault of the court. That case is now res adjudicata and beyond our control, and the present case must be considered as if no stipulation had been made, and the record evidence in the case, which consists exclusively of the docket entries of the justice of the peace who entertained jurisdiction of the garnishee proceedings against the defendant, must stand or fall by themselves. It seems that the papers are lost or cannot be found, and there was no attempt to prove their contents. The entries in the docket of a justice showing appearance of the defendant would be sufficient to warrant the judgment in ordinary common-law causes. But the proceeding of garnishment is special and statutory, and in derogation of the common law. It is a proceeding by which the debtor is compelled to pay another than his creditor, and the right of the creditor is transferred to another against his will, and this can only be done by force of the statute strictly pursued. It is in the nature of a proceeding in rem, by which the plaintiff is sought to be invested with the right to appropriate to the satisfaction of his claim against the defendant a debt due from the garnishee to him. This being the nature of the proceeding, the principle is elementary that jurisdiction of the court therein must affirmatively appear. Robertson *v.* Kinkhead, 26 Wis. 560; Sup'rs of Crawford Co. *v.* Le Clerk, 4 Chand. 56; Booth *v.* Rycroft, 3 Wis. 157.

The learned and eminent chief justice of this court, in Steen *v.* Norton, 45 Wis. 412, uses this language in respect to this proceeding: "It is not the policy of the statute to place this anomalous action, like ordinary actions, at the mere discretion of the plaintiff, or to give justices of the peace unqualified jurisdiction of it, as in

ordinary actions, where every person can become a plaintiff, have process, and put the justice's jurisdiction in motion, on demand. The plaintiff in garnishee proceedings, as in attachment, as mesne process, replevin, and the like, can put in motion the jurisdiction of the justice only by complying with statutory prerequisites. And the justice takes jurisdiction of the proceeding only upon the plaintiff's compliance with the preliminaries which the statute makes the condition of jurisdiction. In order to entitle a plaintiff to have recourse to the process of garnishment in order to confer on the justice jurisdiction to entertain it, he must first make the affidavit required by the statute. . . . An affidavit materially defective stands as no affidavit. All proceedings founded on a materially defective affidavit are coram non judice. And no appearance, no submission of the garnishee can operate to waive the defect of jurisdiction. . . . He cannot absolutely appear and substitute his creditor's creditor for his own, because that goes to the jurisdiction of the subject, not to jurisdiction of his person."

In most and perhaps all of the cases of garnishment sought to be introduced in evidence in defence of this action, there is an entry by the justice that an affidavit was made and filed. What the affidavit contained does not appear. The affidavit, being the prerequisite of jurisdiction, must not only appear upon the records, but be strictly sufficient; and, not appearing, no jurisdiction whatever is shown in the justice. This is a fatal objection to proceedings, and the circuit court properly refused to admit them in evidence.

The only remaining questions rest upon the receiving of improper evidence, and the adjustment of the costs. The testimony received against the objection of the appellant relates to the transaction of the shipment of the wagon, and the collection bill therefor, forwarded to the agent of the defendant at Marshalltown, Iowa. This evidence was, of course, entirely immaterial so far as the subject-matter of the action is concerned; for this action is simply for money had and received by the defendant to the use of the plaintiff, under the last amended complaint; and even the relations of consignor, carrier, and consignee have nothing to do with it except as facts showing the defendant in possession of money belonging to the plaintiff, in connection with other proof that the money belonged to the plaintiff alone, and not to the plaintiff and one Cartright jointly, as implied by the direction upon the package. For the purpose of establishing this last-mentioned fact, the ownership of the wagons before they were shipped, their shipment, and the terms of their delivery to Downs, the purchaser, and the collection bill sent to the agent of the defendant, would be pertinent evidence; and for such purpose at least it was admissible. The question in respect to the costs would seem to be like the one

raised on the former appeal, and then held to be within the discretion of the circuit court.

The judgment of the circuit court is affirmed.

LYON, J., took no part.

JOHN A. CARTON AND CO.

v.

ILLINOIS CENTRAL R. R. CO.

(*Advance Cases. Iowa, July* 12, 1882.)

An act of the state legislature, whose object and purpose is to control and regulate the shipment of freight to points in other states, is in violation of article 1, § 8, of the constitution of the United States, as being legislation on interstate commerce,—a subject which is in its nature national, and requiring the exclusive legislation of Congress.

An interstate contract of shipment, entered into by a common carrier, is an entire contract, and the laws of the state wherein it is made, so far as they attempt to regulate interstate commerce, do not enter into it as a part of the contract, being repugnant to the federal constitution.

BECK, J., dissenting.

A contract is subject to the laws of the state wherein it is made and which are applicable thereto.

A state may enact statutes regulating charges on shipments of goods, unless they should be found to be in conflict with the constitution of the United States as a regulation of commerce, and in the absence of any legislation by Congress upon the subject, such laws cannot be regarded as an encroachment upon the authority of the general government.

Such regulations of commerce only as impose burdens and restrictions are forbidden to the states by the constitution of the United States, but laws which aid in securing expeditious and cheap transportation, and which remove burdens, impediments, and restrictions imposed on commerce by common carriers through unnecessary delays, and by their unreasonable and unjust exactions and discriminating charges, are not regulations of commerce within the contemplation of the constitution of the United States.

APPEAL from Hardin Circuit Court.

This is an action to recover certain alleged excessive freight charges paid by the plaintiff to the defendant for transporting grain from Ackley, in this state, to Chicago, Illinois. The cause was tried in the court below without a jury, and upon an agreement as to the facts, and judgment was rendered for the defendants for costs. Plaintiffs appeal.

Brown & Carney, for appellants. John F. Duncombe, for appellee.

ROTHROCK, J.—1. It appears from the agreed statement of facts that between the eleventh day of April, A.D. 1875, and the four-

teenth day of April, 1876, the plaintiffs delivered to the defendant at Ackley, Iowa, to be shipped to Chicago, Illinois, through defendant, 129 car loads of wheat, and the defendant fixed the price and charged for the freight thereon from Ackley to Chicago 37 cents per 100 pounds, or $74 per car load of 20,000 pounds; and between April 14, 1876, and March 11, 1878, 120 cars more, for which the defendant received and charged for shipment the same rate. The grain was loaded at Ackley in cars furnished by the defendant, and carried through in bulk to Chicago in a continuous shipment. All of the cars were billed through from Ackley, Iowa, to Chicago, Illinois, and the defendant fixed the rate of freight and gave plaintiffs through shipping receipts to Chicago. It is claimed that the freight thus charged, and paid by the plaintiffs, was in excess of that authorized by the laws of Iowa at that time in force; that the distance from Ackley by defendant's road to Dubuque, on the Iowa state line, is 132 miles, and the distance from Dubuque to Chicago by defendant's line is 202 miles, making a total distance through both states of 334 miles, and that the rate of freight fixed by the law of Illinois was at that time less than the rate fixed by the statute of Iowa. Damages are claimed for the difference between what was authorized by the law of Iowa to be charged for the transportation for the whole distance; also for attorney's fees for prosecuting the action.

It is claimed by counsel for the defendant that the law of Iowa then in force, (being chapter 68 of the Acts of the Fifteenth General Assembly,) by its plain language and meaning, had no application to contracts made for the transportation of freight into other states. Section 3 of that act, so far as applicable to this case, is as follows: "The tariff of rates established in the following schedule shall be considered the basis on which to compute the compensation for transporting freights, goods, merchandise, or property over any kind of railroad within this state. . . ." Some of us think this language excludes contracts for the transportation of freights to points without the state. But as the plaintiffs claim that these were contracts made in Iowa for through shipments to Chicago, and that by tacking the law of Illinois to the law of Iowa, thus making it one continuous haul, the rate for the continuous haul, being in excess of that authorized by the law of Iowa, may be recovered back. We think it is not necessary to put a construction upon the law of this state in this regard, but rest our decision upon another ground.

It is claimed by the defendant that whatever construction may be put on the law of this state, it can have no application to shipments of freight from this state to other states, because state legislation of that character is void as being contrary to article 1, § 8, of the constitution of the United States, which confers upon Congress the power "to regulate commerce with foreign nations, and among

the several states." Now, if this position be correct, it is needless to enter into a discussion of all the questions so elaborately and ably discussed by counsel in this case. If the law of Iowa, conceding that it contemplates the control or regulation of shipments of freights to other states, is in that particular void as being an infraction of the federal constitution, it cannot be enforced, and the defendant was not bound to obey it, and could fix its own freight tariff, and the plaintiffs cannot recover for a violation of the statute, whatever other rights they may have.

It is not claimed that the fixing of rates of freight shipped from one state into another is not a regulation of commerce. "Any regulation of the transportation of freight upon the high seas, the lakes, the rivers, or upon railroads or other artificial channels of communication, is a regulation of commerce itself." City of Council Bluffs *v.* K. C., St. J. & C. B. R. Co., 45 Iowa, 338. This has been repeatedly held by the Supreme Court of the United States. Reading R. Co. *v.* Pennsylvania, 15 Wall. 232; Passenger Cases, 7 How. 283; State of Pennsylvania *v.* Wheeling Bridge Co., 18 How. 421; Gibbons *v.* Ogden, 9 Wheat. 1.

There is a line of cases determined in the Supreme Court of the United States which hold that it is competent for the states, in the absence of legislation by Congress, to legislate respecting interstate commerce; but those cases have been such as relate to bridges or dams across streams wholly within a state, police laws relating to pilots of vessels, health laws, and the like. See Cooley *v.* Board of Wardens, 12 How. 299; Gilman *v.* Philadelphia, 3 Wall. 713. But that court has always held that the power to enact laws upon subjects in their nature national, and not merely local, is exclusively with Congress. In Cooley *v.* Board of Wardens, supra, it is said: "Whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

That the act of this state, assuming that its object and purpose was to control and regulate the shipments of freight to other states, is of the character last defined, appears to be very clear, and we are not without authority upon this question, and from a source which, so far as questions involving the construction of the federal constitution are involved, are binding upon this court and all other courts in the Union.

The legislature of the state of Pennsylvania enacted a law imposing a tax upon freight taken up within the state and carried out of it, or taken up without the state and carried within it. The Pennsylvania R. R. Co. refused to pay the tax, upon the ground that the law was unconstitutional and void, being in conflict with the constitution of the United States, which ordains that "Congress shall have power to regulate commerce with foreign nations and among the several states."

In the case of State Freight Tax, 15 Wall. 232, involving the validity of this act, it was held that the tax imposed thereby was upon the freight carried, and that it was a regulation of interstate transportation or commerce among the states. The court in that case say: "If, then, this is a tax upon freight carried between states, and a tax because of its transportation, and if such tax is in effect a regulation of interstate commerce, the conclusion seems to be inevitable that it is in conflict with the constitution of the United States." It is there further said: "The rule has been asserted with great clearness that whenever the subjects over which a power to regulate commerce is asserted are in their nature national, or admit of one uniform system or plan of regulation, they may justly be said to be of such a nature as to require exclusive legislation by Congress. Truly, transportation of passengers or merchandise through a state, or from one state to another, is of this nature."

In Henderson *v.* Mayor of New York, 92 U. S. 272, the following language is used: "It is said, however, that under the decisions of this court there is a kind of neutral ground, especially in that covered by the regulation of commerce, which may be occupied by the state, and its legislation be valid, so long as it interferes with no act of Congress or treaty of the United States. Such a proposition is supported by the opinions of several of the judges in the Passenger Cases; by the decisions of this court in Cooley *v.* Board of Wardens, 12 How. 299; and by the cases of Crandall *v.* Nevada, 6 Wall. 35, and Gilman *v.* Philadelphia, 3 Wall. 713. But this doctrine has always been controverted in this court, and has seldom, if ever, been stated without dissent. These decisions, however, all agree that under the commercial clause of the constitution, or within its compass, there are powers which, from their nature, are exclusive in Congress; and in the case of Cooley *v.* Board of Wardens it is said that "whatever subjects of this power are in their nature national, or admit of one uniform system or plan of regulation, may justly be said to be of such a nature as to require exclusive legislation by Congress."

In the case of Railroad Co. *v.* Maryland, 21 Wall. 456, it was determined that the charter of the Baltimore and Ohio R. R. Co. for constructing and operating a branch railroad from Baltimore to Washington, upon a stipulation contained in the charter that the company should pay the state of Maryland one-fifth of the amount of money received for the transportation of passengers, was not an infraction of the federal constitution as being a regulation of interstate commerce. It is there said: "The exercise of power on the part of the state is very different from the imposition of a tax or duty upon the movements or operations of commerce between the states. Such an imposition, whether relating to persons or goods, we have decided the states cannot make, because it would be a regulation of commerce between the states in a matter in which

uniformity is essential to the rights of all, and therefore requiring the exclusive legislation of Congress." In that case the state of Maryland, in granting the charter, expressly reserved the right to part of the earnings of the road, and the power to do so was upheld upon the principle that if the state had itself built the road and operated it, it would have been entitled to its earnings.

The cases of State *v.* Munse, 94 U. S. 113; C., B. and Q. R. Co. *v.* Iowa, Id. 155; and Peill *v.* C. and N. W. R. Co., Id. 164, do not appear to us to sanction the validity of acts of the state legislature regulating the transportation of freight and passengers between the states. They merely determine the power of the states to fix reasonable warehouse charges and reasonable charges for transportation of freight within the boundaries of the states respectively, and that when such power is exercised, although it may incidentally affect commerce between the states, yet the laws of the states are not regulations of interstate commerce because of such incidental results. That it was not intended in those cases to approve legislation like that under consideration in this case it appears to us is conclusively shown by the reasoning in the later cases of Hall *v.* De Cuir, 95 U. S. 485, and Railroad Co. *v.* Hannen, Id. 465.

2. It is urged with great earnestness that these contracts of shipment are entire contracts, and having been entered into in Iowa, the laws of this state entered into and became a part of the contracts, and the statute fixing the rate governed the price for the entire distance. This rule is, no doubt, correct when applied to a valid enactment of the legislature of the state where a contract is entered into, and no one doubts the power of a common carrier to bind itself to ship freight beyond state lines, or even to foreign countries and beyond the terminus of its line of transportation. Under such a contract it is everywhere held that the carrier is bound to perform his contract and is liable for loss by negligence. But this position of counsel, it seems to us, begs the question, because if the law of Iowa under consideration is an unauthorized regulation of interstate commerce, it cannot enter into and become part of any contract. This position of counsel forcibly illustrates the correctness of our conclusions, that the law in question, if held to have been intended to operate upon interstate traffic, is directly and palpably contrary to the constitution of the United States. If the law entered into and became part of the contract of shipment we would have a law of Iowa which would control and regulate the transportation of freight not only to the remotest parts of the states and territories of this country, but extending to all the nations of the earth to which lines of common carriers extend, and to which local carriers may undertake to transport goods. That such legislation is national in its character it seems to us must be conceded.

If we are correct in these views there is but little more necessary to be said in this case. The plaintiffs claim to recover because the

amount of freight money exacted by the defendant was in excess of the rate fixed by the law of Iowa. The contract of shipment was an entirety. It cannot be severed and made to apply partly to the shipment in Iowa and partly to that in Illinois. It was the right of the defendant to disregard any laws which sought to regulate shipments to points without the state, and make its own contracts. Having done so, the plaintiffs cannot recover under any state laws, simply because it is void as being repugnant to the federal constitution. Whether the plaintiffs are entitled to any relief, independent of the statute, we do not determine, because that question is not in this case. Affirmed.

BECK, J., dissenting.—1. I am unable to concur in the arguments and conclusions announced in the preceding opinion of the court prepared by Mr. Justice Rothrock. The case is one of great importance, as the decision affects the interest of all the people of the state. This consideration has stimulated me in its careful examination with the purpose of preparing an extended discussion of the doctrines which, in my opinion, should control the decision of the important questions involved in the case. But I am unable, within the limited time which other judicial duties permit me to devote to the case to carry out my purpose, and I am compelled to limit myself to a brief statement of the principles upon which I base my dissent to the opinion of the majority of the court.

2. It is shown by the record before us that defendant received the grain shipped by plaintiffs for transportation to the city of Chicago. A contract was thus entered into by the defendant for the carriage of the grain from Ackley to Chicago. This contract was made in Ackley, and is therefore subject to the laws of the state applicable thereto.

3. It is competent for the state to enact the statute in question, unless it should be found to be in conflict with the constitution of the United States as a regulation of commerce. The statute is not in conflict with the federal constitution for the following reasons:

4. Conceding the statute has the effect of regulating commerce, it is enacted in the exercise of a power which is vested concurrently in the state and national governments; and as it is not in conflict with any law of the United States, and as Congress has not enacted any statute upon its subject it cannot be regarded as an encroachment upon the authority of the general government. Until Congress assumes the exercise of its authority over the subject of the statute in question, the state is free to legislate upon it.

5. In my opinion, regulations of commerce which impose burdens and restrictions thereon only, are forbidden to the states by the constitution of the United States. The states are free to enact all laws which will aid in securing the expeditious and cheap transportation of property used in the commerce of the country. Of

this character are statutes providing for the construction of the mediums of transportation of property, for its protection while in transit, and for the protection of the means of transportation used by common carriers. Enactments prescribing the duties and obligations of carriers are of the same character and class. It must be remembered that railroads do not constitute commerce. They are means used by commerce. The corporations operating them are common carriers employed in the commerce of the country. Burdens, impediments, and restrictions may be imposed on commerce by these common carriers. This may be done by unnecessary delays, and by unreasonable and unjust charges for carrying goods, and the like. Statutes which remove burdens and restrictions imposed in this way upon commerce, which protect it from unjust exactions by common carriers, are not regulations of commerce within the contemplation of the constitution of the United States. The statute of the state brought in question in the case is of this character. It was intended and it operated to protect and stimulate commerce by preventing oppressive and discriminating charges for the transportation of property used in the commerce of the country.

These conclusions, in my opinion, are based upon doctrines well established by decisions of the United States Supreme Court and of this court.

JOHN A. MILLARD, Jr., Respondent,

v.

THE MISSOURI, KANSAS AND TEXAS R. R. Co., Appellant.

(86 *New York Reports*, 441.)

Plaintiff purchased a passenger ticket on defendant's road, which entitled him to carry a certain amount of baggage. He had a packing-box or trunk containing merchandise. Upon applying for a check, he advised defendant's agent of this fact, who thereupon refused to check the trunk unless extra compensation was paid for its transportation; plaintiff paid the sum charged; the trunk was destroyed by fire. In a prior action brought to recover for the loss of baggage, the court ruled that plaintiff could not recover for the merchandise as it was not baggage, and a recovery was had for the baggage. In an action brought to recover for the merchandise, *held*, that the former action was not a bar, as the two actions were not for parts of one entire indivisible demand, but were based upon separate contracts.

(Argued October 7, 1881; decided October 25, 1881.)

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made February 10, 1880, which affirmed a judgment in favor of plaintiff, entered upon a verdict. (Reported below, 20 Hun, 191.)

This action was brought to recover for the loss of certain merchandise, while being transported on defendant's road.

The facts proved were substantially these:

On the 30th of April, 1873, the plaintiff and one William Brady purchased tickets and took passage on defendant's road at St. Louis, Mo., for Denison, Texas. Plaintiff had with him a valise, containing his wearing apparel and articles known as baggage, and a packing-box, or trunk, containing merchandise. Brady had with him one trunk, containing his personal baggage, and two packing-boxes, or trunks, containing merchandise. The tickets entitled the plaintiff and Mr. Brady to carry a certain amount of baggage without extra compensation. The defendant's agent at St. Louis, on being advised of their contents, refused to put the packing-boxes aboard the train, and insisted that they should be sent as freight. The plaintiff explained to him the nature of their contents, and that it was important that they should go on the train with them; and thereupon the agent weighed them together with the baggage, and charged $8 or $10 for carrying the packing-boxes, which plaintiff and Mr. Brady paid, and they were then put aboard the train with the baggage; all were destroyed by fire on the following day, while in defendant's possession, and during the journey. Mr. Brady assigned his claims against the defendant to the plaintiff, and in 1873 the latter brought an action to recover the value of the baggage so lost; he recovered judgment in said action, which was paid. A bill of particulars was served in that action which contained the items of merchandise contained in the packing-boxes as well as the baggage; the court, however, ruled upon the trial that nothing but the personal baggage could be recovered for in that action, as the complaint did not allege the contract to convey the merchandise, and that the goods now in suit did not come within the term "baggage," and accordingly excluded proof in regard to the same; and plaintiff withdrew all claims for such merchandise.

Thomas W. Osborn for appellant. The contract between plaintiff and defendant being entire, and plaintiff having had one recovery and satisfaction therefor, has exhausted his remedy; the former judgment is a complete bar to this action. (Baird *v.* U. S., 96 U. S. [6 Otto] 430, 432; O'Beirne *v.* Lloyd, 43 N. Y. 248; Hopf *v.* Myers, 42 Barb. 270; Secor *v.* Sturges, 16 N. Y. 548; Bendernagle *v.* Cocks, 19 Wend. 207; Fish *v.* Folley, 6 Hill, 54; Miller *v.* Covert, 1 Wend. 487; Farrington *v.* Payne, 15 Johns. 432; Jex *v.* Jacob, 19 Hun, 105.) The judgment of a court of competent jurisdiction is final not only as to the subject-matter thereby actually determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided. (Embury *v.* Conner, 3 Comst. 322; Hoff *v.* Myers, 42 Barb. 270; Dunham *v.* Bower, C. of App., 77 N. Y. 79.)

Freling H. Smith for respondent. The plaintiff has two causes

of action against the defendant. (Solomon *v.* The Gt. W. R. R. Co., 67 N. Y. 208; Stoneman *v.* Erie Ry. Co., 52 id. 429.) A former judgment is a bar not to all claims that might have been litigated therein, but only to such claims or matters as might have been litigated under the pleadings and issues as made. (Burdick *v.* Post, 12 Barb. 168; Bates *v.* Stanton, 1 Duer, 79.) The judgment must be upon the very point in issue. Both actions must be in substance and in point of fact identical. (Slauson *v.* Inglehart, 34 Barb. 193.) The record must show that the same matters might have been litigated and the proof must show that they were litigated. (Davis *v.* Talcott, 14 Barb. 611, 620; Campbell *v.* Butts, 3 Comst. 173.) The same cause of action is where the same evidence will support both actions. (Snider *v.* Croyl, 2 Johns. 227; Rice *v.* King, 7 id. 20; Johnson *v.* Smith, 8 id. 383; Miller *v.* Manice, 6 Hill, 114; Lawrence *v.* Hunt, 10 Wend. 80.)

EARL, J.—The claim is made on the part of the appellant, that the rule, that where a party brings an action for a part only of an entire, indivisible demand, and recovers judgment, he cannot subsequently maintain an action for another part of the same demand, was violated in the judgment rendered in this action.

The facts, as the trial judge found them, or may be presumed in support of the judgment to have found them, are as follows: There were two contracts made with each, the plaintiff and his assignor, one with each to carry him and his baggage, and the other subsequently made to carry the chattels contained in his trunk.

It was decided in the prior action that that was based solely upon the contract to carry the passengers and their baggage. The recovery was there limited to such baggage, and it was held that the contracts alleged did not cover the chattels involved in this action.

This action is based upon separate contracts to carry the chattels which were not properly baggage, and which were contained in the trunks. It was manifestly in reference to such chattels that the extra compensation was demanded by the defendant and separate contracts thus made.

The former recovery does not, therefore, bar this action. A single demand was not divided in violation of the rule above referred to. (Stoneman *v.* Erie Ry. Co., 52 N. Y. 429; Sloman *v.* The Great Western Ry. Co., 67 id. 208.) And this result follows although the plaintiff in the former action recovered for the trunks in which the chattels here in question were packed, because such recovery was had, perhaps erroneously, under the contracts there alleged, and not under the contracts alleged in this action.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

WOOD
v.
CHICAGO, M. AND ST. P. RY. CO.

(*Advance Case, Iowa. July* 13, 1882.)

Whether the station agents along the line of a railway have authority to bind the company by contracts to furnish cars for the transportation of property is a question of fact and not of law, nor can courts take judicial notice that such agents possess such power, or are held out to the world as possessing it; and it is error to reject testimony offered to prove they have such power.

Beck, J., dissenting.

The law will regard station agents as fully authorized to make contracts for future transportation of property, and there is no necessity for the shipper to prove that the station agent was authorized by the railroad company to make the contract for transportation.

APPEAL from Clayton circuit court.

The plaintiff alleges that the defendant contracted to furnish the plaintiff, on the sixteenth of October, 1879, two cars in which to ship potatoes from Enfield, a station on defendant's road, to Denison, Texas; that defendant failed to furnish the cars until the second day of November; and that by reason of this delay the potatoes were frozen, to the damage of plaintiff in the sum of $300. The cause was tried to a jury, and resulted in a verdict and judgment for plaintiff for $252.44. The defendant appeals. The material facts are stated in the opinion.

W. A. Hoyt and Noble & Updegraff, for appellant. W. A. Preston, for appellee.

DAY, J.—The plaintiff testified that he made the contract for the cars with J. C. Barnes, the station agent of the defendant at Strawberry Point. No proof whatever was introduced of the scope of his agency or the extent of his powers, nor in the manner in which he had been held out to the public by the defendant. J. C. Barnes was introduced as a witness on behalf of defendant, and testified that he agreed only to try to get the cars for plaintiff by the time named. Barnes was asked the following question by defendant: "State whether or not, as agent for the defendant, you had at this time any authority to contract to furnish cars at any point at any particular time." The plaintiff objected to this question as immaterial, irrelevant, and incompetent. The objection was sustained, and the defendant excepted. The defendant asked the court to instruct the jury as follows: "The burden of proof is upon the plaintiff to show that J. C. Barnes, the station agent of

defendant, was authorized to bind said defendant by a contract to have cars at Enfield ready for loading upon any particular day, and the fact that said Barnes was station agent of the defendant at Enfield, aforesaid, is not sufficient evidence to prove that he had authority to bind defendant by such contract." The court refused to give this instruction, to which the defendant excepted.

The court instructed the jury as follows: "If you find from the evidence that the railway company, by its agent at Enfield, made an agreement with the plaintiff to have cars at that place on the sixteenth of October, 1879, for the shipment of the potatoes in question; and if you find that the plaintiff had his potatoes there for shipment on that day, and was prevented from so doing in consequence of the defendant's not having the cars there; and if you further find that the plaintiff was diligent to preserve the potatoes from damage until they could be shipped, and that in consequence of such neglect to have the cars there the plaintiff's potatoes were frozen, then the defendant is liable for such damage." To the giving of this instruction the defendant excepted. These several actions of the court are assigned as error. The court evidently assumed that a station agent, as such, must, as matter of law, have authority to bind the company by his contract to furnish cars at a given station at a particular time. It is urged by appellant that it would be impracticable to confer such power upon a mere local station agent. It is said that the disposition of cars must, of necessity, be under the disposition of some central head, cognizant of the necessities and demand of the whole line of railway. There seems to us to be much force in these suggestions. But we have not now to deal with the question whether it would be practicable to confer such power, but whether such power has in fact been conferred, or the station agents of the defendant have been held out to the public as possessing such powers. This is a question of fact, and not one of law. Courts cannot say, as matter of law, that station agents must possess the power to bind the company by such contracts, nor can the courts take judicial notice that such agents possess such power, or are held out to the world as possessing it. The defendant proposed to show whether or not the defendant did possess power to bind it by such a contract. In rejecting the proffered testimony the court erred. The court also erred in giving the instruction excepted to, and in refusing the one asked. Reversed.

BECK, J., dissenting.—Railroad corporations, as common carriers, are under obligation to receive and transport with promptness and fidelity all property delivered at their cars, or at places or in warehouses designated by their course of business. The time for the receipt of property for transportation may be regulated by contract between carriers and consignor. Railroads are managed by officers

of the corporations at their principal place of business, who employ subordinates at the various towns and stations through which the roads run. These subordinates are called station agents, and they have the authority to receive property for transportation. It cannot be pretended that if a consignor offers property for transportation the station agent is not authorized to bind the corporation by a contract to carry it. The company cannot protect itself by withholding authority from its agent to make such contract. If it could do this it would be able to defeat the rule obligating it to receive and carry all property offered for transportation. In order that it may discharge this obligation it employs station agents, and the law will not permit it to so limit the agent's powers that it may refuse to carry property at the pleasure of its officers. If a station agent can contract to carry property to-day, he may bind the corporation by a like contract to carry it to-morrow. This power of the station agent to contract for future transportation is of the first importance to the business of the country. It is certainly true that much of the property transported by railroads is carried under contracts of this character.

The most important duty of station agents, so far as shippers are concerned, is to provide cars for the future transportation of property. Shippers must know the time cars will be supplied them in order to have the merchandise at the depots or elsewhere, ready for shipment. In the case of live-stock and perishable articles the railways always contract to furnish cars at a given time. Any other course of business would entail loss upon shippers of such articles and would operate as an embargo upon the business of shipping fruits, vegetables, ice, poultry, and even fat hogs. No shipper could buy potatoes in the fall of the year and store them in warehouses, unless he could depend upon the contracts of the railroads to furnish him cars to ship them before the freezing weather should set in.

As a matter of fact, in the course of the business of the roads, station agents do make contracts for the furnishing of cars, and are authorized to do so. The station agent and no other person is accessible to the consignor. It is true that the cars of a railroad are under the control of one officer, but he speaks through the station agent, who is accessible to him by telegraph every minute of each day. The station agent makes the contract under the direction of the proper officer having control of the cars. As it is impossible for the shipper to contract with any other officer, and as the station agent is authorized to make contracts for cars, his contracts are binding.

These considerations lead me to the conclusion that the law will regard the station agent as fully authorized to make contracts for the future transportation of property. It was not, therefore, necessary for plaintiff to prove that the station agent was autho-

rized by the defendant to make the contract for the transportation of his potatoes at a future day. The law presumes that he did possess such power.

In my opinion the judgment of the circuit court ought to be affirmed.

CINCINNATI, SANDUSKY AND CLEVELAND R. R. Co.

v.

ELIZA COOK.

(*Advance Case, Ohio. November* 15, 1881.)

The act of April 20, 1874 (71 Ohio L. 146), giving a penalty of $150. to the party aggrieved by a railroad corporation for overcharging for the transportation of passengers or property, is not in contravention of the constitution.

A petition under said act against a corporation for demanding and receiving excessive fare in the sale of a passenger ticket to a person desirous of travelling on its road between the points named on the ticket, is not bad, on demurrer, for want of an averment that the purchaser of the ticket was, in fact, transported on the ticket for which excessive fare was exacted.

A petition under said act is not bad for want of an averment that the excessive fare was paid by the plaintiff in the due course of business, although judgment was not rendered thereon until after said act was repealed by the act of March 30, 1875 (72 Ohio L. 143), saving only pending actions and causes of action under the repealed statute, where the excessive fare was paid in the due course of business and not for the purpose of obtaining the penalty.

Several causes of action for penalties under said act may be united in the same petition.

Where such action stands for judgment on the petition, it is not error to refuse to empanel a jury to assess damages.

ERROR to the District Court of Logan County.

The original action was brought on the 15th of August, 1874, in the Court of Common Pleas of Logan County, by the defendant in error, against the plaintiff in error, for overcharging passenger fare in violation of the act of April 20, 1874, (71 Ohio Laws, 146).

The petition contained two causes of action. The first count charged that the defendant on June 10, 1874, had demanded and received from the plaintiff, the sum of thirty-five cents for a passenger ticket on its railroad, from Bellefontaine to New Richland, a distance of 9 9-10 miles, over which portion of the defendant's road the plaintiff desired to be transported. The second count charged that the defendant, on the same day, had collected from plaintiff who was then a passenger on its cars, the sum of thirty-five cents for fare from New Richland to Bellefontaine, a distance of 9 9-10 miles. Prayer for judgment on each count for $150.

Defendant demurred to this petition on the ground, among others, that several causes of action were improperly joined, and to each count, that it did not state facts sufficient to constitute a cause of action. These demurrers were overruled, and the defendant, being in default for want of answer, demanded a jury for the assessment of damages, but the court refused to empanel a jury, and rendered judgment in favor of the plaintiff for $300 and costs.

This judgment was afterward affirmed by the district court.

McIlvaine, J.—The statute of April 20, 1874 (71 Ohio L. 146), after enacting, among other things, that a corporation "operating a railroad in whole or in part in this State, may demand and receive for the transportation of passengers on said road, not exceeding three cents per mile for a distance of more than eight miles; provided, the fare shall always be made that multiple of five nearest reached by multiplying the rate by the distance;" further provides that "every such corporation, its officers, employees, or agents who shall violate, or permit to be violated, the provisions of this act, or any other corporation, its officers, employees, or agents, who shall demand or receive a greater sum of money for the transportation of passengers or property on or over their railroad than the sum allowed by law, shall pay to the party aggrieved for every such overcharge a sum equal to double the amount of such overcharge; but in no case shall the amount to be paid be less than one hundred and fifty dollars."

The first question raised on the demurrer, and chiefly urged in the argument of the case, relates to the constitutionality of the statute upon which the action is based. Numerous objections to the validity of statute are urged. It is contended, that if the right of action given to the party aggrieved is for compensation for an injury, the province of a jury is invaded by fixing the minimum recovery at $150. We need not stop to consider the soundness of this proposition, as it is conceded by counsel for plaintiff in error, in which concession we entirely concur, that the minimum sum to be paid for overcharging fare, where the actual damage of the party aggrieved is less than one hundred and fifty dollars, is in the nature of a penalty—is punishment rather than compensation.

In this view of the statute, however, it is contended, that a violation of its provisions is an offence against a public law. And prosecutions therefor must be carried on in the name and by the authority of the State of Ohio. Sec. 20, Art. 4, Constitution. And further, that if for a violation of the statute, the guilty party cannot be prosecuted in a civil action. The rule of the code of civil procedure which declares that allegations in a petition not denied by answer shall be taken as true, violates the principle guaranteed by the constitution. Sec. 10, Art. 1, that no per-

son in any criminal case shall be compelled to be a witness against himself. The summing up of the argument by counsel, I quote:

"These conclusions are thus reached: If the forfeiture of the statute be deemed compensatory, it violates the great civil right of trial by jury; and right of the citizen to have the compensation for injuries done measured by the judgment of the tribunal. For if it be competent for the legislature to prescribe the minimum of compensation in any case, it may in all cases, and, as in the present instance, may fix such minimum greatly in excess of any probable or even possible injury, thus reducing the right of jury trial to a mockery.

"If the forfeiture of the statute be deemed punitive, it violates the constitutional guarantees of liberty in the several respects above stated, by making the punishment of crime against the sovereignty of public law an instrument in the hands of private malice, fraud and conspiracy, to be secured without jury or witnesses, through the virtual, involuntary confession of the accused."

The principles of the constitution above referred to are wholly misapplied by counsel in argument. These provisions were not intended to inhibit private actions for damages resulting from the violation of a public statute, nor for a penalty where the right of action therefor is given to the party aggrieved, nor even prosecutions in the nature of qui tam actions. All prosecutions for the violation of criminal laws, on behalf of the State, or general public, must be in the name of the State and by its authority, and in such prosecutions the person charged cannot be compelled to be a witness against himself; but where a right of private action is given by statute for a penalty, a civil action in the name of the party under the civil code, with all its incidents, is the proper remedy unless otherwise provided specially.

Before the trial in the court below, the Act of 1874 was repealed by the Act of March 30, 1875 (72 Ohio L. 143), as follows: "Sec. 2. That the said Act of April 20, 1874, be and the same is hereby repealed, and the repeal of said act shall affect and annul penalties accruing or accrued under said act or the Act of April 25, 1873, repealed thereby; Provided, that no railroad company or corporation shall be released from its liability in actions now pending and causes of action heretofore accrued to any person from whom such railroad company or corporation, by its officers or agents, shall have demanded and received fare or freight at a rate above that allowed by law; Provided, such person paid out overcharges while using such railroad in the due course of his or her business, and not for the purpose or with the view of obtaining the penalty provided by law for such overcharge," etc. Wherefore, it is claimed, that the petition was not sufficient to support the judgment for the reason that it did not show that the plaintiff was within the saving clause.

Whether an action could have been maintained under the Act of 1874, where the overcharge was not paid in the due course of business, but was paid for the purpose of obtaining the penalty, to say the least, is doubtful; but it is clear, that since its repeal in 1875, a cause of action arising under it was lost by the repeal unless the party was within the terms of the saving clause; yet if an action was pending at the time of the repeal and the petition stated a cause of action under the statute, its subsequent repeal, the case being in fact within the saving clause, did not render the petition insufficient. And we think the petition was sufficient under the Act of 1874. If the plaintiff's case was obnoxious to the charge of bad faith, the petition, however, stating a cause of action in the terms of the statute, the bad faith was, under the Act of 1874, a matter of defence—assuming that the payment of the excessive fare was not in the due course of business, but was for the purpose of obtaining the penalty—would have defeated the action. In the case before us, the testimony not being in the record, we must assume that it was shown that the plaintiff was within the saving clause of the repealing statute.

It is also claimed, that the first count in the petition is bad for want of an averment that the plaintiff was a passenger on the defendant's cars from Bellefontaine to New Richland, or that the ticket purchased was in fact used by a passenger. This objection is answered by the principle above stated. The allegation of the petition is as broad as the terms of the statute, namely: that the defendant demanded and received excessive fare from the plaintiff for the transportation of a passenger. If the passenger was not transported, or in other words, if the payment of the fare was not in the due course of business, but was made for the purpose of obtaining the penalty, the plaintiff under the Act of 1874, was not bound to aver to the contrary, until such fact was set up by way of defence.

A question of some difficulty is raised as to the joinder of causes of action. Our statute provides for the joinder of actions as follows: "The plaintiff may unite several causes of action in the same petition, whether they be such as have heretofore been denominated legal or equitable, or both, when they are included in either one of the following classes: . . . 3. Injuries, with or without force, to person or property, or either," Sec. 80 of the code of 1853. The joinder in this case, if justified at all, is under this clause.

There is no doubt that this section should be construed liberally for the purpose of preventing multiplicity of actions; and we are inclined under this rule of construction to hold that the causes of action in the petition are for injuries to property; and if this be so, the joinder was proper.

The wrongful taking of another's property is an injury to the

property. Wrongfully demanding and receiving the plaintiff's money for fare in excess of the amount authorized by law, was an injury to her in her property. Although it was taken without protest, the company acquired no right to retain it. It being unlawful to demand or receive it, the railroad company unlawfully exacted and converted it; and for this wrong and injury the statute gave the plaintiff a right of action; and our best judgment is, that several causes of action for such injuries may be united in the same petition.

There was no error in the court refusing a demand by the defendant for a jury to assess damages. There was no issue of fact for a jury to try. The statute, upon the facts admitted by the pleadings, fixed the amount of the recovery. If an issue had been joined for the trial of which either party might, of right, have demanded a jury, upon the finding of the jury upon the issue for the plaintiff below, the amount of their verdict would have been controlled by the statute.

Judgment affirmed.

OKEY, C. J.—In my opinion the judgment should be reversed in part and affirmed in part. The second cause of action is sufficiently stated, and the judgment as to that should be affirmed. The first cause of action is as follows: "On the 10th day of June, 1874, the plaintiff was at Bellefontaine, in Logan county, and desired to go from there to the town of New Richland, in said county, the distance of nine and nine-tenths miles. At the office of said company, at Bellefontaine, the plaintiff purchased from the defendant's agent a ticket from Bellefontaine to New Richland, which ticket represented that the plaintiff had paid her fare or toll from Bellefontaine to New Richland, and was entitled to ride on defendant's cars on said road (of the defendant) from Bellefontaine to New Richland. For said ticket and fare as aforesaid, defendant, by its agent, charged, demanded, and received of the plaintiff the sum and price of thirty-five cents, and the plaintiff paid said sum of thirty-five cents for said ticket and fare, which was more than defendant was entitled by law to charge and receive for riding on said railroad said distance of nine and nine-tenths miles, whereby an action has accrued to the plaintiff for the same, and the plaintiff is entitled to have and receive from the defendant, by reason of the premises, the sum of one hundred and fifty dollars."

The statement of this cause of action is not aided by any other matter in the record. I deny that such statement is as broad as the statute. It is not stated in terms, nor even in substance, that the plaintiff below was transported to New Richland. The statute, quoted in the opinion of the court, limited the sum which the company might "demand and receive, for the transportation of passengers on said road," to a sum "not exceeding three cents per

mile," and made highly penal a violation of its provisions. Indeed, for receiving five cents—the amount alleged in this cause of action—in excess of the prescribed fare, the penalty must be at least one hundred and fifty dollars; and knowledge, on the part of the agent, that the sum is in excess of the lawful fare, is not made by the statute a material element in maintaining the action. Such a statute, according to well settled principles, must be construed strictly. So construed, the first cause of action, above set forth, is insufficient, in failing to state that the defendant in error was transported on the road. The inhibition is not against the sale of tickets to a purchaser thereof, but receiving an unlawful rate of fare "for the transportation of passengers on said road." According to the construction of the majority, a right of action accrued to the defendant in error the moment she bought the ticket of an agent, and there was not left to the company even locus penitentiæ. But in my opinion no penalty is incurred under the statute, unless for the act of transportation actually performed by the company, a sum in excess of that prescribed in the statute has been exacted. Nothing of the sort is stated in the first cause of action, and hence it is insufficient. If one from whom illegal fare is exacted is not actually carried, he may recover the money so paid, but not the penalty prescribed in the statute. The section, of course, is susceptible of the meaning ascribed to it by the majority of the court; but where a statute highly penal in its provisions admits of two probable but conflicting constructions, that is to be preferred which is most favorable to him against whom the penalty is asserted.

YORTON

v.

MILWAUKEE, LAKE SHORE AND WESTERN RY. CO.

(*Advance Case, Wisconsin. February* 7, 1882.)

A regulation by a railway company by which one who has paid his fare between two points on the road, but desires to stop over at an intermediate point, is required to procure a stop-over ticket from the conductor and present it to the conductor of the train on which he seeks to complete his journey as evidence of his right to do so without further payment, is a reasonable regulation.

If the passenger, in such a case, asks the proper conductor for a stop-over ticket, and through the conductor's fault receives instead thereof only a trip check, the second conductor may still demand of him the additional fare, and, upon his refusal to pay it, may eject him from the train at some usual stopping place, using no unnecessary force; and such ejection will be no

ground of recovery against the company, though such company will be liable to the passenger for the fault of the first conductor.

APPEAL from county court, Milwaukee county.

Nathaniel Pereles & Sons and E. P. Smith for respondent. Cottrill, Cary & Hanson, for appellant.

COLE, C. J.—It is an admitted fact that the plaintiff purchased a ticket at Marion for transportation over the defendant's road to Oshkosh, and took the train at the former place. For the purposes of this appeal it is assumed that he delivered that ticket to the first conductor, Sherman, and asked for a lay-over ticket at Clintonville, an intermediate station, and that through the fault or mistake of the conductor he received a trip or train check instead of a stop-over ticket, which he asked for, and which the conductor undertook to give him. It may further be assumed that he was not bound to read the check, and was guilty of no negligence in not reading it, though it would certainly have notified him that it only entitled him to ride on that train, and then have called the attention of the conductor to the mistake he had made.

These facts being assumed in the plaintiff's favor, we may further assume that his account of the circumstances attending his ejection from the train is, in the main, correct. He says, in substance, the next morning, when he took another train at Clintonville, under charge of another conductor, when asked for his ticket he presented the check which Sherman had given him. The second conductor properly told him that he could not ride on his train on that check; that it was only good with Sherman; and that he must either pay his fare to Oshkosh or leave the train. This was said to the plaintiff while upon the cars at Clintonville, before the train started, and while he had ample opportunity to leave the train. Indeed, the plaintiff testified that this same conversation was repeated before the train started from Clintonville, the conductor all the time telling him that the check gave him no right to ride on his train, that he must either pay his fare or leave the train, while he asserted his right to go on that train, because he had once paid his fare. Thus the matter stood when the train left Clintonville, the plaintiff remaining on the cars, and, as the train approached the next station, upon his fare being again demanded by the conductor, and refused, he was forcibly ejected from the train at the Bear Creek station, more than six miles from Clintonville. He was left at the station at about 3.30 o'clock in the morning on the 28th of October; the depot was closed, and he was unable to obtain shelter; he was exposed to cold, damp winds, contracted a violent cold, and became sick. This exposure and sickness resulting from being ejected from the train at the time and in the manner he was, constituted his principal claim for damages.

On the question of damages the learned county court charged the jury that if they found the facts relating to the purchase and surrender of the ticket by the plaintiff, and his expulsion from the train, to be as detailed by the plaintiff's witnesses, that then the plaintiff was entitled to recover full compensatory damages for the defendant's acts; that in assessing such damages the plaintiff was entitled to recover not only for the mere pecuniary loss and expense, loss of time, and inability to attend to his business directly resulting from said acts, but also bodily suffering, mental pain, and disquietude, and the sense of injury and humiliation felt from the indignity inflicted in being so unjustly expelled from the cars; that this would include all bodily ailments, lameness, suffering, and fatigue resulting from his being so ejected, or from the exposure to the weather in the night; that in considering the question of damages the jury might take into account the manner and time of the plaintiff being ejected from the cars, the situation and surroundings of the place where he was so ejected, and all circumstances which had been shown going to aggravate the injury, and assess full damages therefor.

This is the substance of the charge on the question of damages, and it manifestly goes upon the hypothesis that the plaintiff had a right to ride upon the train on the facts detailed by him, and that his expulsion therefrom was unlawful. In this view we think the learned county court erred. The learned counsel for the defendant insists that no claim for any damages whatever was shown or established. He says the ticket first bought was for a continuous passage from Marion to Oshkosh, and that as the plaintiff voluntarily left the train at Clintonville the company was under no obligation to give him a stop-over check or transport him on another train. But the conductor, Sherman, testified that he was accustomed to give these stop-over checks when requested by passengers, and he was doubtless authorized to give them. The reason why he did not give one to the plaintiff when he took up his through ticket, he says, was because the plaintiff did not ask for one, being then uncertain whether he would stop at Clintonville or not, consequently he gave him a trip or train check only. This was Sherman's understanding in the matter, and a stop-over check was not given because it was not asked for, and not for the reason that it was unusual to give them. So that, without attempting to settle the conflict in the testimony upon this point, we assume that a stop-over check was asked for by the plaintiff when he surrendered his ticket, and that it was the conductor's fault that he did not receive one.

Then the question arises, was the plaintiff entitled to ride on a subsequent train, not having a proper stop-over check, or was the second conductor justified under the circumstances in putting him off the train when he refused to pay his fare? The court below

held that a rule or regulation of a railway company requiring passengers who ride upon its trains to procure from the conductor, or person in charge of the train, a stop-over check if they desired to stop before concluding their journey or before reaching the point to which they had purchased a ticket, was a reasonable rule and binding on passengers riding on its trains. The correctness of this proposition is hardly debatable. Now it is practically conceded that the defendant company had such a rule or regulation for the guide of its conductors. If it had, it would necessarily follow that it was the clear duty of the second conductor to obey and enforce the rule or regulation. Consequently he was perfectly justifiable in ejecting the plaintiff from his train when plaintiff had no proper voucher, produced no sufficient evidence of his right to ride thereon, refused to pay fare, and he himself was ignorant of the transaction between the plaintiff and the conductor Sherman. It seems to us there was no other course for him to pursue under the rules of the company, for he was certainly not bound to take the plaintiff's word that he had paid his fare, and that Sherman had made a mistake in not giving him a stop-over check.

It is apparent that the right of the plaintiff to ride on the train without a proper voucher, and the right of the second conductor to eject him for want of said voucher, were inconsistent rights, which could not co-exist at the same time. Therefore, under the rule of the company, the second conductor was merely authorized and required to put the plaintiff off his train when he refused to pay fare, using no more violence than was necessary to accomplish his object, for the plaintiff had no right to remain on the train without a proper voucher, or producing some evidence showing he was entitled to carriage on that train without paying additional fare; for, suppose the plaintiff had received from Sherman when he surrendered the ticket the proper stop-over check, but had lost it before he took the subsequent train, could he have insisted in that case upon riding on a train with another conductor without paying fare? It seems to us he could not. It would be the duty of the second conductor, in the case supposed, to eject him from the train on his refusing to pay fare, at some usual stopping place, using no unnecessary force. So, here, the plaintiff was not entitled upon anything he showed the second conductor to ride on his train. That conductor, therefore, had the lawful right to eject him from it; nay, he was bound to do so, in obedience to the reasonable rules of the company which required a passenger to obtain from his conductor a stop-over check, when he desired to stop before reaching the place to which he had purchased a ticket; and the mistake or fault of the conductor in not giving him, on request, such a check, would not give him a lawful right to ride on the second train, though he might recover damages against the company for the wrongful act of the first conductor. Townsend *v.* N. Y.

C. and H. R. Ry., 56 N. Y. 295; Chicago, etc., v. Griffin, 68 Ill. 499.

The case of Townsend v. Ry. supra, is quite in point on the question we are considering. There the plaintiff purchased a ticket at the Sing Sing station for Rhinebeck, but took a train going no further north than Poughkeepsie. The conductor on the train called for tickets, and the plaintiff handed him his ticket, receiving back no check or other evidence showing a right to a passage on any other train of the defendant; nor did the plaintiff ask for a return of his ticket, or for any such evidence. He left the train at Poughkeepsie, where it stopped, and waited until another train arrived from New York going to Albany, which he took. After the train started "the conductor called upon him for his ticket, in reply to which the plaintiff told him that he had purchased a ticket from Sing Sing to Rhinebeck, which the conductor of the other train had not given back to him. Some of the passengers told the conductor that the plaintiff had such a ticket. The conductor told the plaintiff that it was his duty, in case he had no ticket, to collect the fare, and that the other conductor would make it right with him. The plaintiff refused to pay fare, and the conductor told him he must leave the train. This the plaintiff refused to do, insisting upon his right to a passage to Rhinebeck upon the ticket which the conductor of the other train had taken. Upon the arrival of the train at Staatsburg, a regular station, the plaintiff still refusing to pay fare or to leave the train upon request, was taken hold of and such force used as was necessary to overcome his resistance, and ejected from the car." The court held that he was lawfully put off the train, notwithstanding the wrongful act of the previous conductor in taking his ticket. The case is well considered, and the opinion of Judge Grover is very instructive. Substantially the same doctrine as to the rights and duties of passengers is laid down in Shelton v. Ry., 29 Ohio St. 214; Dawes v. Ry., 36 Conn. 287; and McClure v. Ry., 34 Md. 532. The cases of Toledo v. McDonough, 53 Ind. 289; Burnham v. Ry., 63 Me. 298; Palmer v. Ry., 3 Rich. (S. C.) 580; Hamilton v. Ry., 53 N. Y. 25; and English v. Canal Co., 66 N. Y. 454, are clearly distinguishable from the case before us.

Putting the plaintiff off the train, then, at Bear Creek station was not an unlawful act. It was what the second conductor was bound to do in the discharge of his duty to the company. It is true, as a consequence of being ejected at that place, at that time, in the night, he contracted a violent cold and became sick. But this exposure he really brought upon himself by his own conduct. Why, then, should he complain about it? He was distinctly told at Clintonville he could not ride on the train unless he paid his fare. He had an ample opportunity to leave the train at that place. But he persistently refused either to leave the train or pay his fare, pre-

ferring to take his chances upon being put off at some subsequent station. He was told by the conductor he would be put off at the next station unless he paid his fare. He might not have been familiar with the surroundings at Bear Creek station, but he certainly knew he would be put off, probably, in the night time. The weather was cold, and he was liable to be exposed on leaving the train. All these things he knew or should have known, but he chose to remain on the train and abide the consequences. Under the circumstances he ought not to recover damages for any exposure or sickness which he brought upon himself by his own foolish and perverse conduct. For, as we have said, he was not entitled to a passage on that train, and was rightfully removed therefrom.

We are not called upon on this appeal to determine definitely what damages the plaintiff is entitled to recover for the wrongful act of the first conductor. It will be in time to consider that question when it shall properly arise. We now only intend to decide that the charge of the county court before referred to, which directed the jury, in the event they found in favor of the plaintiff, that they should assess damages for injuries arising from sickness, exposure, or bodily suffering which resulted from his being justly expelled from the train at Bear Creek station, was erroneous. For the reasons given the plaintiff was not entitled to recover any damages on that ground. The other exceptions taken to instructions given, or refusals to give instructions, need not be considered.

The judgment of the county court is reversed, and a new trial ordered.

See Petrie v. Pennsylvania R. R. Co., 1 Am. and Eng. R. R. Cas. 258.

ALBERT D. SWAN

v.

MANCHESTER AND LAWRENCE RAILROAD.

(*Advance Cases. Massachusetts, January*, 1882.)

A railroad company made a discount of fifteen cents upon tickets purchased of a ticket agent. Until the time advertised for the departure of the train had expired the ticket agent had been in his office. He left it after that time, and while the train was approaching, to aid the station agent, as he was accustomed to do, in loading the baggage. While the plaintiff did not approach the ticket office to find it vacant and the ticket seller absent until after the time had expired for the departure of the train as advertised, there was sufficient time for him to have purchased his ticket before the train actually started from the station if the ticket seller had then been in

the office. He entered the train without a ticket, and the conductor, acting according to the rules of the company, demanded the full price for the fare, which the plaintiff refused to pay, insisting upon his right to be carried for the reduced rate, which he tendered, but which the conductor refused. The plaintiff was expelled from the train at the next station. *Held*, that he was properly expelled from the cars; and *held* further, that he was not entitled to purchase a ticket at the station where he was expelled, and demand to be carried on the same train.

ACTION of tort in two counts. The case was submitted on agreed facts, the material parts of which appear in the abstract of opinion. The Superior Court ordered judgment for the defendant; and the plaintiff appealed to this court.

E. T. Burley, for the plaintiff.

J. W. Fellows, W. L. Thompson and J. H. George for the defendant.

DEVENS, J.—The regulation that all passengers who shall purchase tickets before entering the cars of a railroad company to be transported therein shall be entitled to a small discount from the advertised rates of fare, but that if such ticket is not purchased the full rate of fare shall be charged, is a reasonable one, and in no way violates the rule which in New Hampshire has the sanction of the statute law that the rates shall be the same for all persons between the same points. Commonwealth *v.* Power, 7 Met. 596; Johnson *v.* Connecticut River Railroad, 46 N. H. 213; St. Louis and Alton Railroad *v.* South, 43 Ill. 176; Illinois Central Railroad *v.* Johnson, 67 Ill. 312; Indianapolis Railroad *v.* Rinard, 46 Ind. 293; Du Laurans *v.* St. Paul Railroad, 15 Minn. 49. The number of persons carried, the rapidity with which the cars move, the frequency and shortness of their stops, the delay and inconvenience of making change, the various details to be attended to by the conductor while the train is in motion or at the stations, the importance to the railroad company of conducting its business at fixed places, render the mode of payment by tickets previously purchased one of advantage to the railroad company and convenience to the public. A passenger who is without a ticket and declines to pay full fare may ordinarily be ejected from a train at a station as one who absolutely refuses to pay his fare. State *v.* Gould, 53 Maine, 279; Stephen *v.* Smith, 29 Vt. 160; Hilliard *v.* Goold, 34 N. H. 230; and cases cited supra.

These positions are not controverted by the plaintiff, who maintains that, although he had no ticket, he was entitled to be carried for the price of one in view of his failure to procure one under the circumstances hereafter stated.

The table of prices advertised by the defendant authorized the ticket seller to make a discount of fifteen cents had the plaintiff purchased one for the journey he proposed to make from Derry to Lawrence, the advertised fare being sixty-five cents. Until the

time advertised for the departure of the train from Derry had expired the ticket seller had been in his office. He left it after that time and while the train was approaching, in order to aid the station agent, as he was accustomed to do, in loading the baggage upon the passenger trains. While the plaintiff did not approach the ticket office to find it vacant and the ticket seller absent until after the time had expired for the departure of the train as advertised, there was sufficient time for him to have procured his ticket before the train actually started from the station if the ticket seller had then been in the office. He entered the train without a ticket, and the conductor, acting according to the rules of the company, demanded the full price for the fare, sixty-five cents, which the plaintiff refused to pay, insisting upon his right to be carried for fifty cents, the price of a ticket, which he tendered, but which the conductor refused, telling the plaintiff he must leave the train at the next station unless the demand for full fare was complied with. On the arrival of the train at the next station the plaintiff, failing to comply with the demand of the conductor, was ordered by him to leave the train, which he did.

Upon this part of his case the plaintiff contends that, inasmuch as he went to the office to procure a ticket and was unable so to do as above stated, he was entitled to be carried for the price of a ticket, which he tendered; and that his exclusion from the train was therefore unjustifiable.

It has been held in a few cases that the offer to carry passengers at a less rate if tickets were procured was in the nature of a proposal like other proposals to enter into a contract dependent for its acceptance upon the compliance with its condition; that it might be withdrawn at any time; that closing the office for the sale of tickets was such withdrawal; and that the offer carried with it no obligation on the part of the company to open an office or to keep such office open for any length of time, it being merely an offer to make the deduction if the ticket should be procured. Crocker *v.* New London, Willimantic and Palmer Railroad, 24 Conn. 249; Bordeaux *v.* Erie Railway, 8 Hun, 579.

In a much larger number of cases, and with much better reason, it has been held that where the railroad undertakes to conduct its business by means of tickets, whether it requires, as it may, the possession of a ticket as a prerequisite to entering its cars, or whether it offers a deduction from the regular or advertised rate to one who shall procure a ticket in advance, it is a part of its duty to afford a reasonable opportunity to obtain its tickets. St. Louis and Alton Railroad *v.* South, ubi supra; Chicago and Alton Railroad *v.* Flogg, 43 Ill. 364; Jeffersonville Railroad *v.* Rogers, 38 Ind. 116; Indianapolis Railroad *v.* Rinard, 46 Ind. 293; Du Laurans *v.* St. Paul Railroad, 15 Minn. 49.

Adopting on this part of the case the rule most favorable to the

plaintiff, he was afforded a fair and reasonable opportunity to obtain a ticket. Delays must necessarily from time to time arise in the progress of a train from a variety of incidental circumstances, but at the stations everything may be definitely arranged with reference to the time when, by the schedule, the train is to depart. The traveller should be at the station sufficiently early to make the ordinary preparation for his journey according to this, and has a right to expect that other matters in which he is interested will be accommodated to the schedule arranged, that suitable persons will then be at the station to take charge of his baggage, and to provide him with tickets. He had a reasonable opportunity to procure a ticket, if for a time sufficient to attend to the business, and up to the time when the train was advertised to depart the ticket office was open and there was a proper person in attendance. The delay of the train did not enlarge his rights, nor would it entitle him to insist that at the station whence he was to start the office of the ticket seller should not be closed until its arrival. Trains may be delayed for hours, especially during the storms of winter, from causes which cannot be controlled. The ticket sellers, especially at the numerous small stations, must have imposed upon them numerous other duties, and it would not be a reasonable rule that should compel them to be at their posts sometimes for hours after the time when everything at the station should have been arranged for the departure. St. Louis and Alton Railroad *v.* South, ubi supra.

The cases of Porter *v.* New York Central Railroad, 34 Barb. 353; Nellis *v.* Same, 30 N. Y. 505; Chase *v.* Same, 26 N. Y. 523, are apparently only in conflict with these views, as they all depend upon a statute of New York applicable to the New York Central Railroad alone, which requires it to keep its offices open "at least one hour prior to the departure of each passenger train from each station." This has been held to mean its actual departure, and that road is necessarily governed by this positive provision of law.

The plaintiff, having no right to insist on being carried for the price of a ticket, and declining to pay the regular fare, was properly excluded from the train on its arrival at Windham, one of the stations on the road.

While the train stopped at Windham, and after his exclusion therefrom, he applied to the ticket seller for a ticket from Windham to Lawrence, tendered him the money therefor, which the ticket seller accepted, but upon being informed of the facts by the conductor, that the plaintiff had taken passage at Derry, and requested not to sell him a ticket, declined so to do and tendered to the plaintiff his money, which the plaintiff declined to receive, at the same time stating "that he wished to go on that train." Under the direction of the conductor the train started, leaving the plaintiff at the station, who proceeded thence to Lawrence by car-

riage, a distance of twelve miles, there not being another train until five hours later.

If his original exclusion were lawful from the train, the plaintiff contends on these facts that the railroad company has no justification for refusing thereafter to transport him to Lawrence. The plaintiff did not seek to purchase a ticket from Windham, or offer the money therefore except to prosecute his journey to Lawrence by the same train which he had entered at Derry, and from which he had been rightfully excluded. Because tickets are sold from Windham to Lawrence he contends that he desired to make a new contract at the regular price from that point, which the defendant as a common carrier of passengers had no right to refuse. Whatever might be his rights if he had sought to purchase a ticket for, or go by, a subsequent train from Windham, he sought to continue a transaction which had commenced by his entering the cars at Derry to go to Lawrence, when he had thus impliedly contracted to pay the regular fare for that journey, which included the distance from Windham. He was not in the situation of a passenger whose journey was to commence at Windham; he had already been brought from Derry, and the claim that he should have been carried by the same train from Windham on paying from that point was a claim that he might renew the same contract he had already broken by paying for the distance over which the journey was yet to be prosecuted, while he made none for the distance over which he had already been transported. While the journey which he had commenced and for which he had contracted to pay continued, he could not at his pleasure break it into two separate transactions. That which he sought to make had been included in his original contract, and the defendant was not obliged to readmit him to the same train from which his exclusion had been proper, so long, at least, as he persisted in his violation of the contract he had originally made.

In O'Brien *v.* Boston and Worcester Railroad, 15 Gray, 20, it was held that a person who had been properly ejected for nonpayment of fare at a place where there was no station could not by again entering the cars and tendering the fare obtain the right to be carried by them. If this case is distinguishable, as the plaintiff suggests, by the fact that the exclusion was there not at a station, and the re-entry into the cars was at a place where the company was not bound to receive passengers, it is also distinguishable, and in this matter not in favor of the plaintiff, by the fact that the person there excluded offered to pay the entire fare for the journey which he had commenced. If the rightful exclusion take place at a station, it is not an unreasonable rule that the person excluded should pay the fare over the distance already travelled before he can purchase a ticket from such station for the remainder of the journey, which will entitle him to be carried on the same train.

This point was directly adjudged in Stone *v.* Chicago and Northwestern Railroad, 47 Iowa, 82. To the same point O'Brien *v.* New York Central and Hudson River Railroad, 80 N. Y. 236. (S. C., 1 Am. and Eng. R. R. Cas. 259.)

The case of State *v.* Campbell, 32 N. J. L. 309, goes further than we are required to do in the present inquiry. The traveller there had an excursion ticket from Brunswick to New York, good for a single day which had passed, and the ticket was thus exhausted. He had also a regular ticket which then entitled him to a passage between the same points. The latter ticket he kept in his pocket, refused to exhibit any other than the exhausted ticket, and was ejected from the cars at Newark, a station on the road. He then exhibited the regular ticket, which would have entitled him to the passage if previously shown, and claimed to re-enter the cars. His previous conduct was held to fully justify his exclusion from the same train.

The only other case cited upon the plaintiff's brief which requires notice is Nelson *v.* Long Island Railroad, 14 N. Y. sup. ct. 140. It was there held that a passenger put off the car for refusing to pay his fare cannot be taken back upon complying with the rule violated, unless he be at a regular station and then and there obtain a ticket or tender his fare. An examination of the case referred to will show that the obtaining a ticket or tendering the fare referred to is a ticket or fare for the whole distance travelled and to be travelled, and not for the remainder of the proposed journey.

Judgment affirmed.

It is proposed in connection with the above case to present in this note a collection of the American authorities relative to the subject of railroad tickets. "Stop-over privileges" and "tickets issued for a limited time" have been the themes of a former note. (See note to Auerbach *v.* N. Y. Central R. R. Co., 6 Am. and Eng. R. R. Cas.) They will not therefore be at present touched upon.

It has been held by innumerable authorities that railroads companies have the right to make regulations with regard to tickets, such as requiring passengers to exhibit them and to give them up at suitable and reasonable times. Balt., etc., R. R. Co. *v.* Blocher, 27 Md. 277; Loung *v.* Alcom, 4 Cush. 606; State *v.* Campbell, 32 N. J. L. 309; Hibbard *v.* New York, etc., R. R. Co., 15 N. Y. 455; People *v.* Caryl, 3 Parker's Crim. Cas. 326; Cresson *v.* Phila. and Reading R. Co., 11 Phila. 597. Of course if such regulations be palpably unjust and oppressive they are not binding upon the passenger. Vedder *v.* Fellows, 20 N. Y. 126.

A passenger may lawfully be required to render up his ticket at any time in the course of his journey, provided a conductor's check be given him in exchange. Northern R. R. Co. *v.* Paige, 22 Barb. 130.

And he is in like manner bound to render it up without such tender of a

check, provided that the next station at which the train stops is his point of destination. Illinois, etc., R. R. Co. v. Whitemore, 43 Ill. 420.

If, however, there be intervening stations at which the train stops, and a considerable distance to the point of destination still to be traversed, the passenger need not give up his ticket unless he is tendered a check. Pittsburg, etc., R. R. Co. v. Hennigh, 39 Ind. 509; State v. Thompson, 20 N. H. 251.

Persons holding commutation tickets must also exhibit such tickets when called upon so to do, otherwise they are bound to pay the full fare demanded by the company. Bennett v. R. R. Co., 7 Phila. 11; Woodward v. Eastern Cos. R. Co., 30 L. J. (Mag. C.) 196; Ripley v. New Jersey, etc., Trans. Co., 31 N. J. L. 388.

Where a passenger has lost his ticket or produces an irregular or improper one, the conductor cannot be expected to listen to explanations on the subject before acting. Such a rule would be a fruitful source of vexation and annoyance both to railroad companies and to the travelling public. Weaver v. Rome, etc., Ry. Co., 3 Thompson & C. 470; Jerome v. Smith, 48 Vt. 230; Downs v. New Haven, etc., R. Co., 36 Conn. 287; Chicago, etc., R. Co. v. Griffin, 68 Ill. 499; Pullman Palace Car Co. v. Reed, 75 Ill. 125; Shelton v. Lake Shore, etc., Ry. Co., 29 Ohio St. 214; Frederick v. Marquette, etc., R. Co., 37 Mich. 342; Thompson v. New York, etc., R. R. Co., 56 N. Y. 295. But see Hamilton v. Third Avenue R. R. Co., 53 N. Y. 25.

See also, for a discussion of this subject, Duke v. Gt. Western R. Co., 14 Upper Can. Q. B. 377. The conductor is, however, bound to allow the passenger a reasonable time to find the ticket, and must not treat him instanter as a trespasser. Maples v. New York, etc., R. R. Co., 38 Conn. 557; Curtis v. Grand Trunk R. Co., 12 Upp. Can. C. P. 89.

If the passenger be a lunatic, and therefore unable to understand the conductor's demand, this is not a fact of which the company can be expected to take notice. Their measure of duty to the lunatic is the same as towards a sane person. Willetts v. Buffalo, etc., R. Co., 14 Barb. 585.

Where a passenger has lost his ticket, it is sufficient if he produce an informal writing by the agent who sold the ticket to him to the effect that the same has been duly issued. St. Louis, etc., R. Co. v. Dalby, 19 Ill. 353; Pullman Palace Car Co. v. Reed, 75 Ill. 125; Toledo, etc., R. Co. v. McDonough, 53 Ind. 289.

The mere fact that one conductor has wrongfully accepted a ticket does not bind a subsequent conductor likewise to receive it. Townsend v. New York, etc., R. Co., 56 N. Y. 295; Shelton v. Lake Shore, etc., R. Co., 29 Ohio St. 214.

The failure to produce a conductor's check on demand is not cured by the production of a ticket in exchange for a coupon from which the check has been given. Jerome v. Smith, 48 Vt. 230.

Where a railroad company owns two routes between different points, one direct and the other indirect, the holder of a through ticket is bound to make up his mind before starting which route he will adopt, and cannot after

starting upon the direct line change his mind, alight at a way-station, and claim to be carried thence by the indirect line to the point of destination. Bennett v. New York, etc., R. R. Co., 69 N. Y. 594; Adwin v. N. Y., etc., R. Co., 60 Barb. 590.

Where a passenger has bought a ticket from one point to another, he is not entitled to use it in the opposite direction from that stipulated on its face. Coleman v. New York, etc., R. R. Co., 106 Mass. 160; Kelley v. Boston, etc., R. R. Co., 67 Me. 163.

A passenger claiming a right to travel at less than the usual rate of fare must produce a written permit or pass from some proper officer of the railroad company entitling him to do so. Goetz v. Hannibal, etc., R. Co., 50 Mo. 472.

A railroad company has a right to discriminate among its passengers between those producing tickets and those not producing them, and to charge the latter class a higher fare than they would have been obliged to pay for the ticket had they purchased it. Hilliard v. Goold, 34 N. H. 230; Stephen v. Smith, 29 Vt. 160; Crocker v. New London, etc., R. Co., 24 Conn. 249; Porter v. New York, etc., R. Co., 34 Barb. 253; Bordeaux v. Erie R. Co., 8 Hun, 579; People v. Tillson, 3 Park Cr. Cas. 234; State v. Chovin, 7 Iowa, 204; St. Louis, etc., R. Co. v. South, 43 Ill. 176; De Laurans v. St. Paul, etc., R. Co., 15 Minn. 49; Jeffersonville, etc., R. Co. v. Rogers, 38 Ind. 116; Indianapolis, etc., R. Co. v. Renard, 46 Ind. 293; The State v. Goold, 53 Me. 279.

It is nevertheless well settled that in order to give a railway company this right, it must afford its passengers a fair opportunity to purchase tickets before starting. Du Laurans v. St. Paul, etc., R. Co., 15 Minn. 49; St. Louis, etc., R. R. Co. v. Dalby, 19 Ill. 353; Chicago, etc., R. Co. v. Flagg, 43 Ill. 364; Jeffersonville, etc.; R. Co., v. Rogers, 38 Ind. 116; Indianapolis, etc., R. Co. v. Renard, 46 Ind. 293; Illinois Cent. R. R. Co. v. Johnson, 67 Ill. 312; Illinois Cent. R. R. Co. v. Cunningham, 67 Ill. 316.

Upon this point the court in Chicago, B. and Q. R. R. Co. v. Parks, 18 Ill. 460, said:

"To justify this discrimination, every reasonable and proper facility must be afforded the passenger to procure his ticket. They must furnish a convenient and accessible place for the sale of tickets, with a competent person in attendance ready to sell them, which should be open and accessible to all passengers for a reasonable time before the departure of each train, and up to the time of its actual departure, so that it shall be really a case of neglect and not of necessity on the part of the passenger, and not the fault of the company. If a company will keep its ticket office closed till a crowd of clamorous passengers have gathered around so as to make it dangerous or inconvenient for females or infirm persons to get tickets, surely the fault is not theirs but tne company's if they do not procure tickets, and, under such circumstances, to charge them more than the prices established for the tickets would be but an imposition and an outrage, which the law cannot sanction."

An excellent illustration of this principle is presented in the case of Nellis v. New York Central R. R. Co., 30 N. Y. 505. There the plaintiff went in the course of the night to the station of the company defendant at Utica. He found the ticket office closed, and accordingly got upon the cars without a ticket. A fare in excess of the legal rate chargeable by the company was demanded of him. This he paid under protest, and subsequently brought suit against the company to recover from it the penalty provided by law for taking more than the rate per mile allowed by its charter of incorporation. The company defended, on the ground that it had charged plaintiff in excess of that rate because he had failed to procure a ticket. The court was of opinion, however, that the company had no right to make such charge, because its ticket office had not been open and the plaintiff had not therefore been allowed a chance of purchasing a ticket. Judgment was therefore rendered against the company.

There is but one reported case which is opposed in principle to those just above cited, viz., Crocker v. New London and P. R. R. Co. See also Bordeaux v. Erie Ry. Co., 8 Hun, 579.

As to the exact measure of duty on the part of the railroad company with regard to keeping open its ticket office before the departure of the train, the authorities are somewhat at variance. In St. Louis and Alton R. R. Co. v. South, 43 Ill. 176, the same conclusion was reached as in the principal case, viz., that the company was only bound to keep the office open until the schedule time for the departure of the train. See also Chicago and Alton R. R. Co. v. Flagg, 43 Ill. 364; Illinois Central R. R. Co. v. Johnson, 67 Ill. 312. But in Porter v. New York, etc., R. Co., 34 Barb. 353, a different doctrine was held, and it was said that the company was bound to keep the office open until the train had actually departed.

Where a passenger refuses to pay the legal fare when demanded of him he may be ejected from the train. State v. Gould, 53 Me. 279; Hilliard v. Gould, 34 N. H. 230; Houston and Texas Cent. R. R. Co. v. Ford, 53 Tex. 364; Lilles v. St. Louis, etc., R. Co., 64 Mo. 464; Ohio, etc., R. Co. v. Muhling, 30 Ill. 9; Great Western R. Co. v. Miller, 19 Mich. 305; Haley v. Chicago, etc., R. R. Co., 21 Iowa, 15; Chicago, etc., R. Co. v. Boger, 1 Bradw. 473; O'Brien v. Boston, etc., R. Co., 15 Gray, 20; The People v. Gibson, 3 Park Cr. C. 234; Chicago, etc., R. Co. v. Peacock, 48 Ill. 253; Fulton v. Grand Trunk R. Co., 17 U. Can., Q. B. 428; Johnson v. C. R. R., 64 N. H. 213; Commonwealth v. Power, 7 Metc. 596; Stephen v. Smith, 29 Vt. 160.

This principle applies equally to the holder of a commutation ticket who does not exhibit his ticket and declines to pay the regular fare. Downs v. New York, etc., R. Co., 36 Conn. 287.

And when once a person has been ejected, he has no right to demand, on tendering the fare, to be permitted to come aboard again. Hibbard v. New York, etc., R. Co., 15 N. Y. 455; Hoffbauer v. D. and N. R. Co., 20 Alb. L. J. 474; O'Brien v. Boston and W. R. Co., 15 Gray, 20; Stone v. Chicago, etc., R. Co., 47 Iowa, 82; State v. Campbell, 32 N. J. L. 309.

A fortiori is this the case where the tender is only of the fare from the point where the passenger has been ejected to the point of destination, no tender being made of the fare chargeable for the distance already traversed. Davis v. Kansas City and St. Jo. R. R. Co., 53 Mo. 317.

Where a passenger is ejected at a way station his proper course is to purchase a ticket to his destination and to tender the fare due for the distance already travelled. In such case the company is bound to admit him on the train. Nelson v. Long Island, etc., R. R. Co., 7 Hun, 140.

Where a passenger without a ticket has paid to the conductor the price of a ticket but refuses to pay the penalty in addition, the conductor is bound to refund him his money before ejecting him from the train. Bland v. Southern Pacific R. R. Co., 55 Cal. 570.

Where a railroad company is in the habit of charging illegal fares, and a passenger with the intent to recover damages from them tenders the legal fare only and is in consequence ejected, the fact of his intending in the first place to sue the company will be submitted to the jury in mitigation of damages. Cincinnati, etc., R. Co. v. Cole, 29 Ohio St. 126.

AUERBACH

v.

NEW YORK CENTRAL, ETC., R. R. CO.

(*Advance Case, New York. May* 30, 1882.)

Where it is expressed in terms upon a railway ticket that it is not good unless "used" on or before a certain day, a presentation of the ticket and its acceptance of it by the conductor before midnight of that day, although the journey is not completed until the next morning, such facts will be held to be a compliance with the condition.

Where the terms of a railway ticket bind the passenger to a continuous journey, such requirement is fulfilled if the passenger commences his journey at an intermediate point.

M. J. HIRSCH, for appellant.
Frank Loomis, for respondent.

EARL, J., delivered the opinion of the court.

This action was brought by the plaintiff to recover damages for being ejected from one of the defendant's cars while he was riding therein as a passenger. He was non-suited at the trial, and the judgment entered upon the non-suit was affirmed at the general term. The material facts of the case are as follows:

The plaintiff being in St. Louis on the 21st day of September, 1877, purchased of the Ohio and Mississippi Ry. Co. a ticket

for a passage from St. Louis, over the several railroads mentioned in coupons annexed to the ticket, to the city of New York. It was specified on the ticket that it was "good" for one continuous passage to point named "in coupon attached;" that in selling the ticket for passage over other roads the company making the sale acted only as agent for such other roads and assumed no responsibility beyond its own line; that the holder of the ticket agreed with the respective companies over whose roads he was to be carried to use the same on or before the 26th day of September then instant, and that if he failed to comply with such agreement, either of the companies might refuse to accept the ticket or any coupon thereof and demand the full regular fare which he agreed to pay. He left St. Louis on the day he bought the ticket, and rode to Cincinnati and stopped there a day. He then rode to Cleveland and stayed there a few hours, and then rode to Buffalo, reaching there on the 24th, and stopped there a day. Before reaching Buffalo he had used all the coupons except the one entitling him to a passage over the defendant's road from Buffalo to New York. The material part of the language upon that coupon is as follows: "Issued by the Ohio and Mississippi Railway on account of New York Central and Hudson River Railroad one first-class passage, Buffalo to New York."

Being desirous of stopping at Rochester the plaintiff purchased a ticket over the defendant's road from Buffalo to Rochester, and upon that ticket rode to Rochester on the 25th, reaching there in the afternoon. He remained there about a day, and in the afternoon of the 26th of September he entered one of the cars upon the defendant's road to complete the passage to the city of New York. He presented his ticket with the one coupon attached to the conductor, and it was accepted by him and was recognized as a proper ticket, and punched several times until the plaintiff reached Hudson, about three or four o'clock A. M., September 27th, when the conductor in charge of the train declined to recognize the ticket, on the ground that the time had run out, and demanded three dollars fare to the city of New York, which the plaintiff declined to pay. The conductor with some force then ejected him from the car.

The trial judge non-suited the plaintiff on the ground that the ticket entitled him to a continuous passage from Buffalo to New York, and not from any intermediate point to New York. The general term affirmed the non-suit, upon the ground that although the plaintiff commenced his passage upon the 26th of September he could not continue it after that date on that ticket.

We are of the opinion that the plaintiff was improperly non-suited. The contract at St. Louis evidenced by the ticket and coupons there sold was not a contract by any one company or by all the companies named in the coupons jointly for a continuous passage from St. Louis to New York. A separate contract was made for

a continuous passage over each of the roads mentioned in the several coupons. Each company, through the agent selling the ticket, made a contract for a passage over its road, and each company assumed responsibility for the passenger only over its road. No company was liable for any accident or default upon any road but its own. This was so by the very terms of the agreement printed upon the ticket. Hence, the defendant is not in a position to claim that the plaintiff was bound to a continuous passage from St. Louis to New York, and it cannot complain of the stoppages at Cincinnati and Cleveland. Hutchinson on Carriers, sec. 579; Brooks v. The Railway, 15 Mich. 332.

But the plaintiff was bound to a continuous passage over the defendant's road—that is, the plaintiff could not enter one train of the defendant's cars and then leave it, and subsequently take another train and complete his journey. He was not, however, bound to commence his passage at Buffalo. He could commence it at Rochester or Albany, or any other point between Buffalo and New York, and there make it continuous. The language of the contract, and the purpose which may be supposed to have influenced the making of it do not require a construction which make it imperative upon a passenger to enter a train at Buffalo. No possible harm or inconvenience could come to the defendant if the passenger should forego his right to ride from Buffalo, and ride only from Rochester or Albany. The purpose was only to continuous passage after the passenger had once entered upon a train. On the 26th of September the plaintiff having a right to enter a train at Buffalo, it cannot be perceived why he could not, with the same ticket, rightfully enter a train upon the same line at any point nearer to the place of destination.

When the plaintiff entered the train at Rochester on the afternoon of the 26th of September and presented his ticket and it was accepted and punched, it was then used within the meaning of the contract. It could then have been taken up. So far as the plaintiff was concerned it had then performed its office. It was thereafter left with him not for his convenience but under regulations of the defendant for its convenience that it might know that his passage had been paid for. The contract did not specify that the passage should be completed on or before the 26th, but that the ticket should be used on or before that day, and that it was so used seems to us too clear for dispute.

The language printed upon the ticket must be regarded as the language of the defendant, and if it is of doubtful import the doubt should not be solved to the detriment of the passenger. If it had been intended by the defendant that the passage should be continuous from St. Louis to New York, or that it should actually commence at Buffalo and be continuous to the city of New York, or that the passage should be completed on or before the 26th of

September, such intention should have been plainly expressed and not left in doubt as might and naturally would mislead the passenger.

We have carefully examined the authorities to which the learned counsel for the defendant has called our attention, and it is sufficient to say that none of them are in conflict with the views above expressed.

The judgment should be reversed and a new trial granted, costs to abide the event.

All concur; Andrews, C. J., in result; Tracy, J., absent.

The questions involved in the principal case are two in number, viz.: (1) The power of a railroad company to limit the use of a ticket purchased from it so as to be available only for one continuous passage, and (2) the power of such a company to limit the time within which such a ticket may be used. These will be considered successively.

The great weight of authority is to the effect that where a railroad company sells a ticket for one continuous passage from point to point, the user thereof cannot claim the right to stop off at an intermediate station and afterwards to resume his journey. Stone *v.* Chicago, etc., R. R. Co., 47 Iowa, 82; Hamilton *v.* N. Y., etc., R. R. Co., 51 N. Y. 100; Cheney *v.* Boston, etc., R. R. Co., 11 Metc. 121; Cleveland, etc., R. R. Co. *v.* Bartram, 11 Ohio St. 457; State *v.* Overton, 24 N. J. L. 435; Johnson *v.* Concord Ry. Co., 46 N. H. 213; Beebe *v.* Ayers, 28 Barb. 275; Drew *v.* Central Pacific R. R. Co., 51 Cal. 425; Briggs *v.* Grand Trunk Ry. Co., 24 Up. Can., Q. B. 510; Craig *v.* Gt. Western Ry. Co., 24 Up. Can., Q. B. 504; Barker *v.* Coffin, 31 Barb. 556; Breen *v.* Texas, etc., R. R. Co., 50 Tex. 43; Gale *v.* Delaware, etc., R. R. Co., 7 Hun, 670; Oil Creek, etc., R. R. Co. *v.* Clark, 72 Pa. St. 231; Terry *v.* Flushing, etc., R. R. Co., 13 Hun, 359; Dunphy *v.* Erie Ry. Co., 10 Jones & Spencer, 128. The law upon this point was succinctly stated in Stone *v.* Ry. Co. supra, thus: "When the plaintiff left the train . . . he voluntarily, and without the defendant's consent, violated the contract, and he had no right to demand to be carried on any of the defendant's trains until a new contract had been entered into. The old contract was at an end through his fault, and he could claim nothing thereunder."

In Maine, however, there is a statute prohibiting railway companies from denying to passengers stop-over privileges. Public Laws of 1871, C. 223; Dryden *v.* Grand Trunk R. R. Co., 60 Me. 512.

Generally where a passenger holding such a continuous ticket stops at an intermediate station and upon boarding a subsequent train refuses to pay the fare, claiming a right of transportation by virtue of his ticket, the conductor will be justified in ejecting him. Dietrich *v.* Penna. R. R. Co., 71 Pa. St. 432; Vankirk *v.* Penna. R. R. Co., 76 Pa. St. 66.

If, however, the passenger has at the time of purchasing the ticket been informed by the agent of the company that he will be accorded the stop-over privilege he is entitled to claim it. It was accordingly held in Burnham *v.* Grand Trunk Ry. Co., 63 Me. 298, where the passenger buying a ticket marked "Good this day only" was informed by the ticket agent that he could stop over night at an intermediate station and afterwards proceed upon his journey, that he was entitled thus to stop over. So where the passenger while in transit inquires of the conductor whether he may stop off and is informed that he has that privilege, the company will be bound by the declarations of the conductor. Tarbell *v.* Northern Central R. R. Co., 24 Hun, 81.

The mere production of a conductor's check is, however, no evidence that

the conductor has permitted the passenger to stop off. It is merely a certificate of the fact that the fare has been paid or the ticket rendered up. McClure v. Phila., Wilm. & Balt. R. R., 34 Md. 532; Cheney v. Boston, etc., R. R. Co., 11 Metc. 121; State v. Overton, 24 N. J. L. 435; Palmer v. R. R. Co., 3 S. C. 580.

Where a conductor grants the stop-over privilege it is exhausted by one exercise thereof and cannot be repeated. Denny v. N. Y. Cen. & Hudson River R. R. Co., 5 Daly, 50; and see Vankirk v. Penna. R. R. Co., 76 Pa. St. 66; and McClure v. Phila., Wilm. & Balt. R. R. Co., 34 Md. 532.

On some roads it seems that the train agent alone is authorized to grant the stop-off privilege, the conductor not having power to do so. In Petrie v. Penna. R. R. Co., 42 N. J. L. 449, the facts were these: Plaintiff, having a ticket good for a continuous passage, stopped at an intermediate station. Upon boarding a subsequent train he presented his ticket, which was refused acceptance. He stated to the conductor that the conductor of the former train had allowed him the stop-over privilege, and in token thereof had written his initials upon the ticket. He was, however, ejected from the train, and thereupon brought suit. On the trial he testified that the stop-over privilege was really given him by the train agent. The court, however, held that he must stand or fall by his statement to the conductor, and that failing to show sufficient authority to stop over, judgment was entered for the plaintiff. It seems that though it has not been the custom of a railroad company to prohibit the stopping over of passengers on through tickets, it may make such regulations, which will thereupon become binding upon all persons travelling on the road, even though they may have no notice of the existence of such regulations. Johnson v. Concord, etc., R. Co., 46 N. H. 213.

A railroad company may also sell tickets expressing on their face the fact that they are only available for a certain limited time, and after the expiration of that time they cannot be presented for passage. Barker v. Coflin, 31 Barb. 556; Boise v. Hudson River R. R. Co., 61 Barb. 611; Elmore v. Sands, 54 N. Y. 512; Hill v. Syracuse, etc., R. Co., 63 N. Y. 101; Farewell v. Grand Trunk, etc., R. Co., 15 Up. Can., C. P. 427; Boston, etc., R. Co. v. Proctor, 1 Allen, 267; Briggs v. Grand Trunk Ry. Co., 24 Upper Canada, Q. B. 510; Nelson v. L. I. R. Co., 7 Hun, 140; Wentz v. Erie Ry. Co., 3 Hun, 241; State v. Campbell, 32 N. J. L. 309; Shedd v. Troy R. R. Co., 40 Vt. 88; Pier v. Finch, 24 Barb. 514.

In the case of Elmore v. Sands, supra, the court says upon this point: "Railroad companies carrying passengers have a right to make reasonable rules and regulations for conducting their business, and they and their agents incur no responsibility in enforcing them in a proper manner. It does not appear that the plaintiff was obliged to purchase the ticket before he could enter the cars. He had his option either to pay upon the train or to purchase the ticket and exhibit that as evidence of his right to ride. The railroad company was not bound to issue the ticket in advance of the day on which it was to be used, and had the right to insist and provide that it should be used on the day when it was issued. . . . Such a regulation is neither unreasonable nor illegal. It is not an uncommon one, and it is not important that we should see all the purposes which it subserves. It is sufficient that it is apparently useful for some purpose. If the ticket be required to be used on the day it is issued, the passenger cannot well use it for more than one trip, and the railroad company will have some information of the number of passengers to provide for on any day. Without such a limitation a conductor might, for aught I can see, permit a passenger to ride for several days and then take up and return the ticket."

In the State of Maine it is, however, provided by statute that all tickets sold by railway companies shall be available for six years from date, and this act has been held to apply to all foreign railway corporations running their

trains within the limits of the state. Dryden *v.* Grand Trunk R. R. Co., 60 Me. 812.

In general an excursion ticket stating upon its face that it is valid for that day only cannot subsequently be made use of. McElroy *v.* R. R. Co., 7 Phila. 206.

And so of commutation tickets for a given number of miles; where these are expressed to be available only for a limited period they cannot subsequently be made use of, even though the total number of miles for which they are issued has not been travelled. Lilles *v.* St. Louis, etc., R. Co., 64 Mo. 464; Sherman *v.* Chicago Ry., 40 Iowa, 45; Powell *v.* Pitts., Ft. W. & Chic. R. R. Co., 25 Ohio St. 70; Terre Haute, etc., R. R. Co. *v.* Fitzgerald, 47 Ind. 79.

A mere verbal declaration by the agent of a railway company that a ticket expressed to be good only for a limited time is good after that time, is of no force or effect against the company, unless the agent is vested with express authority to make such a statement. Boise *v.* Hudson River R. R. Co., 61 Barb. 611; McClure *v.* P. W. & B. R. R. Co., 34 Md. 532.

The punching of an expired ticket by a baggage agent is no waiver of its invalidity. Wentz *v.* Erie Railway Co., 5 Thomp. & C. 556.

Nor is the receipt of such a ticket by one conductor after its expiration binding upon another conductor so as to oblige him to receive it for passage. Johnson *v.* Concord R. R. Co., 46 N. H. 213; Hill *v.* Syracuse, etc., R. R. Co., 68 N. Y. 101; Stone *v.* Chicago, etc., Ry. Co., 47 Iowa, 82; Kelley *v.* Boston & Me. R. R. Co., 67 Me. 173; Wakefield *v.* South Boston R. Co., 117 Mass. 544; Sherman *v.* Chicago R. R. Co., 40 Iowa, 45; Dietrich *v.* Penna. R. R. Co., 71 Pa. St. 432. It may prove of interest to those reading the principal case to have some idea of the line of argument adopted by the court below, the Common Pleas of New York. The following is the material part of the opinion of that court: "It is said that the words ought not to be construed so as to make the ticket which was good at the beginning bad if the train should not arrive at the end of the day named in the margin. Such a construction is said to be unreasonable. Is it not unreasonable if such be the import of the language of the ticket. It is not quite as unreasonable to allow a passenger with a limited ticket, which declares that it shall not be good after a certain date, to enter the cars five minutes before midnight of the time specified, and then begin a journey that may not end for three or four days afterwards? The running of trains, as everybody knows, is regulated by time tables, and a person about to purchase a ticket may always ascertain the time ordinarily taken by the cars to arrive at a given point. He may, if he chooses, know at what time it will be necessary for him to start in order to reach his destination before his ticket, if it be limited as to time, has expired. If he delays his departure, or if for purposes of his own he leaves the train and breaks up the journey so that the day designated by his ticket as the limit beyond which it will not be accepted has passed before his travel is at an end, he ought not to complain if the railroad company do exactly what the ticket declares it may do, reject the ticket and collect the fare anew. The case is different when he begins his journey in time to reach his destination in the usual course of travel, before the expiration of the limit fixed by the ticket, but is prevented by delays occurring upon the railroad from finishing it in the lifetime of the ticket. In such a case he may, without regard to the limit, travel upon the ticket to the point to which he bought it. In short, if it be the fault of the passenger that the ticket has expired before he has arrived at his destination he must bear the loss and pay the regular fare; but if his failure to reach the point for which the ticket is bought is imputable to the railway company, he is entitled to use the ticket, though the time for which it is limited has passed."

THE STATE OF INDIANA

v.

FRY.

(*Advance Case, Indiana. May* 18, 1882.)

By virtue of Sec. 8 of the act of March 9, 1875 (1 Rev. Stat., Indiana, 1876, p. 259), regulating the issuing of railroad tickets and coupons, all special tickets are exempted from the operation of said act whether they are half fare or excursion tickets or special in any other respect.

WORDEN, J.—This was an indictment against the appellee for selling a railroad ticket without a certificate of authority, as provided for the act regulating the issuing and taking up of tickets and coupons of tickets by common carriers, etc., approved March 9, 1875; 1 R. S. 1876, p. 259.

On motion of the defendant the indictment was quashed.

The State excepted and appeals.

It is alleged in the indictment that the ticket was issued by the Cincinnati, Indianapolis, St. Louis and Chicago R. R. Co., was a first class ticket and evidenced the right and entitled the holder to be transferred in a continuous passage over certain railroads mentioned, from the city of Indianapolis in the State of Indiana, to the town of North Vernon in that State, and thence to Louisville in the State of Kentucky. That there was stamped across the face of the ticket the word "special." The 8th section of the act above mentioned, as we find it printed in the statute book referred to, provides as follows: "The provisions of this act shall not apply to special, half-fare, or excursion tickets." It is said that in the enrolled bill the punctuation is different there being no comma between the words "special" and "half-fare." And it is claimed by the State that the section should be so read as to exempt from the operation of the statute two classes of tickets only, viz., half-fare tickets and excursion tickets. But why exempt from the operation of the statute half-fare tickets or excursion tickets any more than any other tickets supplied at less than the usual full fare, whether it be more or less than half fare? Such special tickets may be subject to conditions not attached to usual full-fare tickets. We think, without any particular reference to the punctuation of the statute, that the legislature intended to exempt from the operation of it all special tickets, whether they are half-fare or excursion tickets, or special in any other respect. From the description of the ticket sold by the defendant we must regard it as a special ticket, and not within the prohibition of the statute.

The judgment below is affirmed.

CHICAGO, ST. LOUIS AND NEW ORLEANS R. R. CO.

v.

JOHN W. SCURR.

(*Advance Case, Mississippi. May* 1, 1882.)

Plaintiff took passage at night on train from Grenada to Torrence. The conductor permitted the train to pass by Torrence without stopping. On reaching the next station the conductor gave to plaintiff an order addressed to the conductor of a freight train, which would pass in a few hours directing that the plaintiff should be carried back to Torrence free of charge. Plaintiff took the order, but did not avail himself of it. The conduct of the conductor throughout the matter was courteous. *Held*, That a verdict for $2,500 which was reduced by the court $833.33 was excessive.

CHALMERS, C. J.—Plaintiff (appellee) took passage at night on defendants' (appellants') train from Grenada to Torrence, holding a ticket for the latter place. Shortly before the train arrived at Torrence the conductor became involved in an altercation with some emigrants, who by mistake had gotten upon the wrong train, and also with a passenger, who without authority had pulled the bell-rope, and thereby stopped the cars. Thrown off his balance by these circumstances, the conductor carelessly and negligently permitted the train to run by Torrence without stopping, and was several miles beyond the depot before he recollected that there were several passengers on board for that point. He took up plaintiff's ticket before reaching the next station (Coffeeville), made to him a statement of the troubles with the emigrants and with the person who had rung the bell, as an explanation and excuse for his own negligence in failing to stop at his place of destination, and promised to make arrangements for his speedy return from Coffeeville without charge. Reaching Coffeeville (eight miles north of Torrence) he repeated his explanation, and delivered to plaintiff an order addressed to the conductor of a freight train, which would pass south in a few hours, directing the plaintiff should be carried back to Torrence free of charge. Plaintiff took the order but did not avail himself of it, preferring to remain in Coffeeville until a passenger train should go south in the afternoon. It is admitted that the conductor throughout the matter was courteous, respectful and polite. Plaintiff arrived at Coffeeville about two hours before day. The night was cold, dark and rainy. He did not remain in the depot building, in which there was a fire, but sought and obtained elsewhere a room, without a fire. Whether the room obtained was furnished with a bed, and if so, whether plaintiff re-

tired to bed does not appear. If he had taken the freight train, upon the conductor of which he held the order for free transportation, he would have reached Torrence about nine o'clock in the morning. As it was he arrived there some time in the afternoon. There is no proof as to the value of his time, nor of any pecuniary loss of any sort, nor does it appear whether he was engaged in any business. There is no claim of mentally or bodily suffering except that plaintiff states that while at Coffeeville "he suffered some from cold."

The jury rendered a verdict against the railroad company for $2,500. Two-thirds of this plaintiff was forced by the court below to remit, and judgment was entered for $833.33. From this judgment defendants, their motion for a new trial having been overruled, prosecute this appeal.

The damages awarded by the jury were not only vindictive and punitory in their character, but so wholly disproportioned to the wrong done and the injury sustained, as at once to shock reason, conscience and common sense. To have permitted the verdict to stand would have been an invitation to every man in the country to embark in the business of riding on railroads in the hope of making a fortune by suing for damages claimed to arise out of some harmless carelessness of a conductor.

As modified by the court, the verdict is less shocking, and perhaps would not be set aside as excessive, if the case had been one justifying the imposition of exemplary damages. That it still remains exemplary and punitory in its character is conceded, since the actual damage apparent from the proof is trifling.

Did the proof warrant the rendering of exemplary damages? By a long train of decisions in this State, which simply announce the rule everywhere recognized, such damages are permissible only where there has been some element of intentional wrong, or in the absence of intention, a negligence so gross as to evince a reckless disregard of consequences.

The idea is variously expressed by different text-writers and judges, and sometimes with a multitude of words; but if to the words, "negligence" and "intention" we add the word "insult," we will perhaps sufficiently embrace all the states of case, in which such damages should be awarded by a jury, or sanctioned by a court. Where the negligence of which a defendant has been guilty bears no aspect of recklessness or wilfulness, and is wholly free from any element of insult or rudeness, there is no justification for the imposition of any damages beyond such as will fully compensate for all injuries actually sustained. Full compensation for all actual damage may in the case of severe injuries, or the disappointment of important engagements, embrace amounts as large as if given by way of punishment; but if the injuries have sprung from that sort of negligence, or carelessness, or forgetfulness, to which

mankind generally are prone, the essential idea of punishment must be discarded. In the case at bar defendant's conductor was clearly remiss in duty, but it is quite apparent that he was neither wilfully, recklessly, nor rudely so. His negligence was inexcusable as to one who demanded compensation for all losses thereby sustained, but it affords no ground whatever for the imposition upon his superiors of that kind of punishment which would stamp his act as criminal. It sprang from that temporary thoughtlessness and inattention, of which we are all more or less guilty in the discharge of our daily duties. For it we must respond in full compensation to those who have a right to demand fidelity and care at our hands, but to punish us beyond this would be to inflict a wrong more grievous than that of which we have ourselves been guilty.

By the second instruction given for plaintiff the court authorized the jury to inflict exemplary damages upon defendants "if in their judgment the wrong and injury were of such character as to call for their imposition," and by plaintiff's fifth instruction the jury were told that the law devolved upon them the power of estimating the damages "as a matter of sentiment and feeling to be exercised by them according to their sound discretion." No criterion was by these instructions afforded the jury for determining whether the case called for the imposition of such damages, but by the first instruction given for the defendant the proper rule on this subject was announced. An instruction however asked by the defendant, substantially declaring that nothing beyond actual damage should be awarded, was by the court refused.

The action of the court on these instructions was erroneous.

The case was plainly one in which exemplary damages were not allowable, and the court should have so informed the jury. Such a direction ought not to be given in a case that admits of doubt, or where there is a conflict of evidence as to any fact, the existence of which, if proved would warrant their imposition, but such was not the case here.

Although the facts were not agreed on, there was no disagreement as to any fact at all material to any issue involved; nor was there anything in the testimony, either of the plaintiff or of the conductor, showing or tending to show fraud, malice, oppression, or recklessness on the part of defendants' employees. Whether evidence is sufficient to establish a particular fact is a question for the jury; whether there is any evidence in support of it is always a matter for the determination of the court; and this doctrine is applied against defendants even in criminal prosecution for life or liberty. Holly's case, 55 Miss. 424.

In announcing the rule in this State as to the measure of damages in actions for the detention of personal property, it was said by this court in Whitfield *v.* Whitfield, 40 Miss. 352–367, that

where there was no fraud, malice, or oppression in the taking or detention of the property its value at the time of taking must be the standard, "and this [say the court] is a rule of law, to be declared by the court."

In Southern R. R. Co. *v.* Kendrick, 40 Miss. 374–390, it is said, that "a neglect of duty, not attended with any circumstances of insult, of aggravation of feeling, of injury to the person or property, of bodily or mental suffering, would not justify vindictive damages; yet if there be any evidence tending to show such circumstances, its weight and force rest peculiarly within the discretion of the jury."

We are prepared to go a step further and say that in any and all actions for damages where the proof fails to show anything that will warrant an imputation of wilfulness, recklessness, or rudeness, it is the duty of the court to inform the jury, when requested so to do, that they cannot inflict punitory damages.

Not to do so, in a case free from doubt, would be an abdication of judicial authority, and a permission to the jury to violate the settled principles of law.

In 2 Thompson on Negligence, 1264, it is said that "whether or not the case is one which justifies exemplary damages, is a question for the court to determine, in its instruction to the jury," and the following among other cases bear out the author's statement: Chicago *v.* Martin, 49 Ill. 241; Heil *v.* Glanding, 42 Penn. S. 493; Kennedy *v.* N. M. R. R., 36 Mo. 351; Ill. Cent. R. R. *v.* Welch, 52 Ill. 184.

The point was squarely met and decided by the Supreme Court of the United States in Milwaukee R. R. Co. *v.* Arms, 91 U. S. 489, in which the lower court had charged the jury that "if you find that the accident was caused by the gross negligence of defendant's servants controlling the train, you may give the plaintiff punitory or vindictive damages." The Supreme Court after examining the facts, came to the conclusion that there was no proof of gross negligence in the case, and reversed the judgment because of the giving of this instruction. See also the note appended to this case, giving the ruling of Mr. Justice Davis on this subject on the circuit.

In N. O. and J. R. R. Co. *v.* Bailey, 40 Miss. 406, an instruction was approved, which declared that "any negligence by a railroad company, operating by the dangerous and powerful agency of steam, well deserves the epithet of gross." This ruling though based on and borrowed from the language of Justice Grier in Philadelphia R. R. Co. *v.* Derby, 14 How. 486, is manifestly unsound.

Gross negligence is synonymous with recklessness, and has frequently been said to be undistinguishable from fraud. If the announcement therefore was sound law, every act of negligence on

the part of a railroad, no matter how slight, would justify the imposition of exemplary damages, and thus we destroy at once that distinction between carelessness and wilfulness which this court has recognized in numberless suits against railroad companies.

Judge Tarbell said, in M. and C. R. R. Co. *v.* Green, 52 Miss. 783, that as against a common carrier punitive damages might be inflicted for a mere omission of duty, "by way of punishment for the neglect of duty to travellers," citing 2 Redfield, section 182. This is an entire misconception of Judge Redfield's text. He was discussing the duty of a common carrier to transport all well-conducted travellers, whether the party suing had a special contract for transportation or not, a duty imposed by reason of his functions as a common carrier; a doctrine, by the way, which found a somewhat vivid and striking illustration in this State in the case of Hiern *v.* M'Caughn, 32 Miss. 17. This doctrine has nothing to do with the measure of damages to be inflicted upon the carrier for his derelictions of duty. It only fixes what that duty is towards the travelling public. For any dereliction of any duty he is to be dealt with as to the measure of damages like other men.

The powers of common carriers over the persons and property committed to their custody is very great, and hence the law imposes upon them the severest exactions, and a degree of responsibility unknown in other callings of life. But though these exactions are more numerous and stringent, a non-performance of them brings to the delinquent just that which a default of duty brings to all men, that is to say, full compensation for thoughtlessness and carelessness; exemplary punishment for recklessness, wilfulness, or insult.

For error in giving plaintiff's second and fifth instructions, and in refusing defendant's second, the judgment is reversed and a new trial awarded.

AMANDA E. TRIGG, RESPONDENT,

v.

ST. LOUIS, K. CITY AND N. R. R. CO., APPELLANT.

(*Advance Case, Missouri. October Term*, 1881.)

Plaintiff with her two children was carried past the station to which she was bound. The conduct of the conductor was courteous and respectful. *Held*, that a verdict for $1000 was excessive.

HOUGH, J.—In August, 1876, the plaintiff was at Norborne, in Carroll County, Mo., with her two children, one being four and the

other between one and two years of age; and, desiring to go to Hardin, in Ray County, she purchased a ticket entitling her to be carried from Norborne to Hardin on one of defendant's passenger trains. The train she took was the defendant's west-bound day train between St. Louis and Kansas City, which usually arrived at Hardin in the evening, between sundown and dark. The material allegations of the petition are substantially as follows:

"That she delivered her ticket to the conductor of the train, who was the agent of and in the employ of defendant.

"That said conductor had full knowledge that she was to get off at Hardin. That it was the duty of said conductor to stop said train at Hardin a sufficient length of time to permit plaintiff to get off at said station, but that, instead of stopping said train a reasonable length of time for plaintiff to get off at said station, he carelessly and negligently started almost instantly upon stopping, and gave no assistance to plaintiff to get off. That she was not able to get off, and was exposed to great danger by the starting of the train, encumbered as she was with her children and baggage, and that, in consequence thereof, she was carried to Richmond and Lexington Junction, in the county of Ray, about six miles from said station of Hardin."

The defendant's answer denied all negligence on its part, and averred that it was in consequence of plaintiff's own negligence that she failed to get off said train at Hardin station.

The facts developed at the trial were as follows:

When the train arrived at Hardin, the plaintiff, being encumbered with considerable baggage and two small children, got to the platform of the car and handed out her luggage, but before she could hand one of her children to the person who was there to help her off the train started. The brakeman seeing her situation and thinking she was about to step off while the train was in motion, stepped in front of her and prevented her from doing so. This, he says, he did, because he thought she would fall under the train with her children. The brakeman then pulled the bell-cord to give the engineer a signal to stop, but the bell-cord was caught, so that the engineer did not get the signal. By that time the conductor had arrived, and, finding out the trouble, he sent the brakeman through the train to tell the engineer to stop, but, by the time the brakeman got to the engineer, and the engineer had stopped the train, it was some distance from the depot. The conductor then asked plaintiff if she would get off there, and she said she would not, and demanded that he should take her back to the depot at Hardin; the conductor testified that he told her that, after passing over the road, he had no right to go back, and that he was afraid to do so, for fear of running into something.

The testimony of the plaintiff on this point was as follows:

"After a few moments the conductor came back to me and said,

'We have carried you past your station—what will you do about it?' I said, 'You will have to carry me back.' He said, 'he could not do it,' and turned off. I thought he spoke very sharp. After we had gone to the trestle-work below the town, the train stopped and the conductor said, 'We will put you off here.' I said, 'No; if you had stopped within a reasonable distance I would have got off.' It was then night. He then said, 'I cannot do any better than to carry you on to the Junction.' I said, 'If that is the best you can do you will have to carry me there.'

The conductor then told her that they would soon be at the junction, and that, when they got there, he would have the porter come and carry her child to the waiting-room, and that he would meet her there. The conductor went to the waiting-room and asked her what was to be done, and she said he would have to get a conveyance to take her back to Hardin, and thereupon the conductor went and got a light spring wagon in which to carry her back, but she refused to go in it, saying she wanted a "hack." The conductor told her he could get nothing better than the spring wagon. Mr. Hughes, a bystander, then advised her to go back on the freight train, but the conductor told her the freight train was behind time, and advised her to go back in the morning on the passenger. The conductor then took her and her children to the dining-room, and gave them, as she says, a good supper, for which he paid. He then told the landlady to give them a good room, and she gave them the best in the house, for which he also paid. He then gave the plaintiff fifty cents with which to pay her fare back to Hardin, which was only six miles from junction and went on with his train. It afterwards appears that at the request of plaintiff's father, the defendant's section boss at Hardin got out his hand-car and went to the junction, and that plaintiff got up and returned with them of her own accord, and without any expense, to Hardin, on the same night.

As to the measure of damages, the court instructed the jury, at the request of the plaintiff, as follows: If the jury find for the plaintiff, in assessing the damages, they will take into consideration the delay to which plaintiff was subjected, the anxiety and suspense of mind suffered by her in consequence thereof, the physical hardship to which it subjected her, and the effect upon her health in consequence thereof, and the danger to which she was exposed in consequence of the train being stopped an insufficient length of time, and will find such sum and amount as the jury may believe the plaintiff is justly entitled to from the evidence, not to exceed the sum claimed in the petition. The jury found a verdict for plaintiff, and assessed the damages at one thousand dollars, and judgment was rendered accordingly.

We are all of opinion that the judgment should be reversed, because the damages are excessive.

The evidence sufficiently supports the finding of the jury that the defendant was negligent in carrying the plaintiff beyond her destination, but as the case is utterly barren of circumstances of aggravation, such as malice, insult, wantonness, violence, oppression, or inhumanity, the damages awarded are so utterly disproportionate to the injury inflicted, that we feel called upon to interfere. It is true the plaintiff testified that when the conductor told her he could not take her back, she thought he "spoke very sharp."

But taking this statement in connection with the subject of conversation and what he actually said, and viewing it also in the light of his subsequent language and conduct, we take it to mean only that the conductor was very positive, and as the action which the plaintiff proposed was such as involved, perhaps, not only her own safety, but the safety of all the passengers on the train, it was a matter about which he probably expressed himself with emphasis. Every passenger, and especially ladies unattended by an escort, have a right to expect and receive ordinary civility from all the servants of a railroad company, with whom they are necessarily brought in contact, and if there is any deviation from this standard it should be on the side of courtesy; and if we were of opinion in this case, that the language or manners of the conductor connected with the negligence complained of bordered upon indignity or insult, we would not hesitate to let the verdict stand.

The instruction as to the measure of damages was erroneous.

Neither the anxiety and suspense of mind suffered by the plaintiff in consequence of the delay, nor the effect upon her health, nor the danger to which she was exposed in consequence of the train being stopped an insufficient length of time, were proper elements of damage in this case, as no personal injury was received by the plaintiff, and no circumstances of aggravation attended the wrongful act complained of. If the anxiety and suspense of mind suffered by the plaintiff in consequence of the delay in this case is a ground of recovery, similar suspense and anxiety of mind would be an equally good ground of recovery in a case where a railroad train should wrongfully stop to take on a passenger.

The general rule is that "Pain of mind, when connected with bodily injury, is the subject of damages; but it must be so connected in order to include in the estimate, unless the injury is accompanied by circumstances of malice, insult, or inhumanity." Pierce on Railroads, ed. 1881, 362; I. B. and W. Ry. Co. *v.* Birney, 71 Ill. 391; Vide also Hobbes *v.* L. and S. W. Ry. Co., 10 L. R. Q. B. 111; P. P. Car Co. *v.* Barker, 7 Col. 377; Francis *v.* St. Louis Transfer Co., 5 Mo. Ap. 7.

If anxiety and suspense of mind are not a ground of recovery here, of course the effects are not.

There is no evidence that, as a consequence of the defendant's

negligence, the plaintiff was subjected to any physical hardship. The only exposure suffered by her was in returning on a hand-car at night in the month of August to Hardin, and that was voluntarily encountered by her. Francis *v.* St. Louis Transfer Co., 5 Mo. Ap. 7.

We have not been referred to any case in which a simple exposure to averted danger has been held to be a ground of recovery —and we do not think it should be unless the exposure were wanton and produced injury.

The measure of damages in a case like the present should be limited to compensation for the inconvenience, loss of time, labor, and expense of travelling back. Nelson *v.* A. and P. R. R., 68 Mo. 593; 2 Redf. on Railways (5th ed. 262).

The judgment will be reversed and the cause remanded. The other judges concur.

WHITWORTH ET AL., Appellants,

v.

THE ERIE RY. CO., Respondent.

(*Advance Case, New York. Jan.* 17, 1882.)

Plaintiffs delivered certain cotton to a despatch company to be carried from Memphis to Liverpool, under bills of lading which contained a clause exempting the company and its connections from liability from loss or damage by fire. The cotton was destroyed by fire in defendant's warehouse at Jersey City. Defendant was not a member of the Despatch Co., and only occupied the relation of intermediate carrier. *Held*, That defendant was entitled to the benefit of the restrictive clause in the bills of lading, and is exonerated from liability unless the fire resulted from its negligence.

Where bills of lading contain a general exemption from liability for loss by fire it is incumbent on the owner of the property, in order to avoid the effect of the exemption, to show that the loss resulted from the carrier's negligence, or some breach of duty which contributed to the loss.

The goods were detained in defendant's freight house because of the neglect of the succeeding carrier to receive them, although notified of their arrival. *Held*, That the detention was not defendant's fault, and did not deprive it of the benefit of the exemption clause.

The occurrence of a fire does not alone justify an inference of negligence, and in the absence of an explanation as to its origin, or evidence that it was in defendant's power to explain, or that by the exercise of reasonable care the fire would not have occurred, no presumption is raised to justify a submission to the jury whether the fire was caused by defendant's negligence.

ANDREWS, Ch. J.—The bills of lading of the Erie and Pacific Despatch, and the Great Western Despatch Company, under which the cotton was shipped, contain provisions limiting the liability of

the carriers, and among others a provision that the respective companies and their connections should not be liable for loss or damage to the property by fire while in transit, or while in deposit or places of transhipment, or at depots or landings at any point of delivery.

The bills of lading were through contracts, that is, contracts for the carriage of the cotton from Memphis, the place of shipment, to Liverpool, England, at a fixed rate for the whole distance. The Oceanic Steam Navigation Company was a party to the bills of lading of the Erie and Pacific Despatch, and the National Steamship Company to those of the Great Western Despatch Company.

But the undertakings of the Erie and Pacific Despatch and the Oceanic Steam Navigation Company, and of the Great Western Despatch Company and the National Steamship Company, although contained in a single instrument, were distinct and several, and not joint.

The bills of lading of the Erie and Pacific Despatch declared that its contract was executed and accomplished, and its liability as common carriers thereunder should terminate on the delivery of the property to the steamship of the Oceanic Steam Navigation Company, at the White Star wharf, Jersey City, when the liability of the steamship company should commence, and not before. Following this provision is the contract of the Steamship Company for the ocean carriage to Liverpool.

The bills of lading of the Great Western Despatch Company are of similar purport, the only difference being in the name of the steamship company joining in the contract.

In February or March, 1873, the plaintiffs delivered to the respective Despatch Companies, at Memphis, under the bills of lading referred to, in all 1090 bales of cotton, consigned to Liverpool, deliverable to the order of the shippers.

The defendant in the course of the transit received this cotton and carried it to Jersey City, the eastern terminus of its line.

On the 21st of March, 1873, 428 bales of the cotton, then in the freight-house of the defendant at that point, were destroyed by fire. The question presented is, whether the defendant is liable for its value.

It is, we think, a clear proposition that the defendant is entitled to the benefit of the restrictive clauses in the bills of lading. They are made applicable by express language to the company using them, and its connections. The defendant's road formed, with other railways, a continuous line of railroad between Memphis and New York. It does not appear that the defendant was a member of either of the despatch companies, or that in respect to the carriage of the cotton it occupied any other relation to those companies than that of intermediate carrier, receiving the property for transportation over its line.

The Despatch Companies were not owners of the railroads over

which the cotton was transported, but used the several lines of road between Memphis and New York in the performance of their contracts with the plaintiffs.

It may be supposed that special and more favorable arrangements were made with the several roads for the carriage of property under the bills of lading of the Despatch Companies, in view of the limited liability therein.

However this may have been, the carriage of the cotton by the defendant in aid of the contracts of the Despatch Companies made it one of the connections mentioned in the bills of lading, and the contract of exemption enured to the defendant's benefit, and the defendant is exonerated from liability for the loss occasioned by the fire, unless the fire resulted from its negligence. Babcock *v.* The L. S. and M. S. Ry. Co., 49 N. Y. 491, and cases cited.

The plaintiff asked to have the question of the defendant's negligence submitted to the jury, but the judge denied the request and granted a non-suit.

The plaintiff's counsel insists that the non-suit was erroneous for two reasons: First, that it having been shown that the fire originated on the defendant's premises, in the roof of the passenger depot, a wooden structure, from which it communicated to the freight-house where the cotton was stored, and no explanation having been given of the origin of the fire, the presumption of negligence attached, and the question should have been submitted to the jury; second, that the evidence tended to show an unreasonable detention of the cotton by the defendant after its arrival, and a violation of its duty to make prompt delivery to the steamship companies, and that except for such detention and non-delivery the cotton would not have been in the freight-house at the time of the fire. (See Road *v.* Spaulding, 30 N. Y. 630; Rawson *v.* Holland, 59 id. 619.)

The bills of lading contain a general exemption from loss by fire, and the loss having occurred from this cause, it was incumbent on the plaintiff, in order to avoid the effect of the exemption, to show that the fire was the result of the defendant's negligence, or that the loss resulted from some breach of duty which contributed to the loss.

The burden was upon the plaintiff to show facts taking the case out of the operation of the clause of exemption. Lamb *v.* Camden and Amboy Railroad, 46 N. Y. 271; Caldwell *v.* The New Jersey Steamboat Co., 47 id. 282; Cochran *v.* Dinsmore, 49 id. 252.

We think there was no evidence tending to show negligence on the part of the defendant, in respect to the origin of the fire.

It was first discovered about mid-day in the roof of the passenger depot, situated about one hundred feet east of the freight-house, where the cotton was stored. The depot had been in use twelve years. There was no evidence how the fire originated, nor

did it appear that there were any persons in the employment of the defendant who had, or might have had, any knowledge upon the subject.

There was a navigable slip eighty feet wide between the passenger depot and the freight-house in which the cotton was stored, and on the east side of the slip was another freight-house adjoining the depot.

The freight-houses were also of wood, and of the same character with the buildings in ordinary use by transportation companies for like purposes at this point. There was a high wind which carried the flames and cinders in the direction of, and communicated the fire to, the freight-houses. There was no omission of diligence in the efforts to save the freight-houses and property after the fire was discovered.

Accidental fires, occurring without negligence, are frequent. The occurrence of a fire does not alone justify the inference of negligence. In the absence of all explanation of the origin of the fire, or evidence tending to show that it was in the power of the defendant to have made such explanation, or that by the exercise of reasonable care the fire would not have occurred, no presumption was raised so as to justify the submission to the jury of the question whether the fire was caused by the negligence of the defendant.

The claim that there was an unreasonable detention of the cotton by the defendant after arrival, and a failure of prompt delivery, is not supported by the proofs.

The general duty of an intermediate carrier of property involves an obligation on his part to deliver the property at the end of his route to the succeeding carrier, within a reasonable time after its arrival. (Rawson *v.* Holland, 59 N. Y. 619.)

The cotton in question was accompanied by way bills. The way bills of the Erie and Pacific Despatch contained the words, "Consigned to Liverpool, England, care of Samuel Debow, New York." Debow was the president and manager of the Erie and Pacific Despatch. In like manner the way bills of the Great Western Despatch Co. consigned the property to the care of its agent in New York.

The uniform course of business between the defendant and the Despatch Companies had been for the defendant, on arrival of property carried under bills of lading, to give notice to the proper agent named in the way bill of such arrival. It then became the duty of the intermediate consignee or agent to obtain a permit from the steamship company for the delivery of the property to the steamship, and deliver the permit to the defendant, and on such permit being obtained the defendant's agent delivered the property on lighters to the proper vessel.

On arrival of the cotton in question prompt notice of the arrival

was given by the defendant in accordance with the custom. But by reason either of the neglect of the agents of the Despatch Companies to obtain the proper permits, or the inability of the steamship companies to receive the property, the defendant was unable to get rid of the cotton, although its agents were persistently urging the agents of the Despatch Companies to obtain the proper permits for its removal.

Upon these facts, we are of opinion that the defendant fully discharged its duty, and is not chargeable with any negligence in respect to the detention of the cotton.

By the course of business, the agents of the Despatch Companies assumed the duty of obtaining the proper permits, and the cotton being consigned to their care the defendant was justified in acting under their directions, and in accordance with the course of business they had established. The defendant made no express contract with the plaintiff to deliver alongside the vessel. Its immediate principals were the Despatch Companies, and it fully discharged its duty when it gave prompt notice of arrival and requested the agent to obtain the proper permits, and held itself in readiness to deliver the cotton as soon as the permits were obtained.

Assuming that there was an unreasonable detention of the cotton at the freight-house of the defendant, it was not its fault, and did not deprive the Erie Railway of the benefit of the restrictive clause in the bills of lading.

The plaintiffs must be deemed to have authorized the defendant to deal with the property according to the custom and under the direction of the Despatch Companies, to whose care it was consigned at New York. See Van Santvoord *v.* St. John, 6 Hill, 157; Mills *v.* The Michigan Central R. R. Co., 45 N. Y. 626.

The judgment should be affirmed.

All concur except Miller, J., absent.

See St. Louis Ins. Co. *v.* St. Louis, etc., R. R. Co., 3 Am. and Eng. R. R. Cas. 260.

THE N. Y. C. AND H. R. R. R. Co., Appellant,

v.

THE STANDARD OIL Co., Respondent.

(*Advance Case, New York. Jan.* 17, 1882.)

In a contract for the transportation of oil to defendant's warehouse defendant agreed to pay freight on delivery, and assumed all risk and loss of its property by fire while in plaintiff's custody or charge. While on plaintiff's barge at a dock of defendant's warehouse the oil was destroyed by a fire originating from a tank boat used by defendant. *Held*, that plaintiff could not

recover freight for the oil so destroyed; that delivery at the warehouse was essential to performance, and without it or lawful excuse for failure the freight was not earned; that the risk assumed by defendant relieved plaintiff from liability for the destruction of the oil, but did not entitle it to recover freight for oil destroyed before it was actually delivered, and that it could not recover for charges thereon paid to its co-contractor.

THIS was an action upon a contract by which plaintiff agreed to transport oil for the defendant and deliver it at the defendant's warehouse. Plaintiff was to load and transport and unload the oil, and the mode of transportation was to vary with the season of navigation. Defendant agreed to pay freight "on the delivery of the oil," and this action was brought to recover the freight on a quantity of oil transported and oil in a barge which was destroyed while lying at a dock of defendant's warehouse, by a fire which originated on a tank boat used by the defendant. Defendant agreed in the contract "to assume all risks and loss of its property by fire when in the charge or custody of the party of the second part, whether said property has been moved upon cars or barges, or is stored or awaiting transportation at any point." The plaintiff claimed to recover $3,569.14 as freight earned in the transportation and delivery to defendant 3,251 barrels of oil and 120 empty barrels. The referee found that only 150 barrels of oil and 69 empty barrels were, in fact, delivered to defendant.

W. A. Beach, for appellant.

Henry J. Scudder, for respondent.

DANFORTH, J.—The contract at the bottom of this action was between the defendant on one side and the plaintiff and the Lake Shore and Michigan Southern Ry. Co. on the other. The latter company was not joined as plaintiff, but the omission, if in any aspect of the case important, was obviated by a stipulation between the parties to the suit. The breach complained of is the omission of the defendant to pay $3,569.14, as freight earned in the transportation and delivery to it of 3251 barrels of oil, and 120 empty barrels.

The referee found that only 150 barrels of oil and 69 empty barrels were, in fact, delivered to the defendant, and gave judgment against it for freight earned in transporting them, estimated at the contract price. The correctness of this decision depends upon the true construction of the agreement.

First. It seems obvious that while the mode of transportation was to vary with the season of navigation, yet whether it was all by rail, or partly by water, the plaintiff was bound to deliver the freight "at the warehouse of the defendant." This was the undertaking; to load and transport, and unload, and this last operation was to be performed in either case. Whether the carriage was by land or water, whether by rail or barge, could make no difference.

The plaintiff agreed to pay all terminal expenses and it was only on delivery at the warehouse that the defendant undertook to pay the price of transportation. It was therefore essential to performance, and without it, or lawful excuse for failure, the price agreed upon for carriage was not earned. Western Transportation Co. *v.* Hoyt, 69 N. Y. 234. Richmond *v.* Union Steamboat Co., decided December, 1881, by this court. Such delivery was not in fact made, and while there was a difference of opinion in the court below (20 Hun, 39), it was not upon this point.

Second. A further question was raised, and as to it the learned judges did not agree. It hung on a clause in the contract by which the defendant assumed "all risks and loss of its property by fire when in the charge or custody" of the plaintiff, "whether said property is being moved upon cars or barges, or is stored or awaiting transportation at any point," and the conceded fact is, that after delivery of so much as is above referred to, and while the rest was in the plaintiff's barges, "an accidental fire consumed it."

The appellant's contention is, that without this stipulation the defendant might refuse to pay freightage in such a case, and "that risk to the carrier the defendant agreed to assume, and thereby waived the right to claim full delivery." It is sustained by an argument of considerable ingenuity, but not sufficient to raise a doubt of the intention of the parties, or the propriety of the referee's refusal to find in accordance with the plaintiff's view. The risks are not those of every accident or contingency, but only damages from fire, and the loss is limited to one from the same element, so it is confined to the defendant's property—not its property at all times or under all conditions, but while in charge of the plaintiff, and while it is being moved upon cars or barges, or is stored or awaiting transportation. How either one of these terms can be made to apply to a risk incurred by the plaintiffs, or to an inchoate obligation which is in no sense property of the defendant, I am unable to perceive. Very different language is needed to bring within the undertaking "risks inflicted by fire" and tending to a loss of partially earned freight, so construed, it would go beyond natural justice, which requires payment of the debt one owes, and nullify the very language of the contract, which following it makes the obligation of payment depend upon the actual delivery of the goods.

Except for the stipulation, the plaintiff would be bound to pay for the loss of the goods destroyed, and its whole purpose is served by relieving the plaintiff from that obligation. It does not permit us to hold that destruction of property is equivalent to its delivery, or that the event which makes performance impossible entitles the carriers to that compensation which by their agreement was to come only from performance. It relieves them from that absolute liability which would otherwise follow the general promise to trans-

port and deliver—and by reason of which the carrier was held in Harmony *v.* Bingham, 12 N. Y. 99, and other like cases.

I do not think the evidence of general usage as to the delivery of freight, or the contract upon that subject between the owners of the barge and the plaintiff, was necessary. The contract was sufficiently explicit and in accord with both. If, however, as the appellant contends, it was susceptible of a construction different from that which has been given to it, it was not improper for the referee to receive the evidence, in order that, from this usage, the course of business and the practice of the plaintiff, he might determine the intention of the parties. The intention of the plaintiff might be gathered from its contract with the barge owners, and that of the defendant from the general usage with which it was familiar, and, for aught that appears, the evidence was received upon the assumption that plaintiff and defendant knew at the time of contract both the custom and the terms of the agreement between the plaintiff and the owners of the boats. 2 Greenleaf's Ev. Vol. 2, 251.

Nor can the back charges—those paid by the plaintiff to its co-contractor—be recovered. They were part of the price for transportation, and cannot be separated from the whole. The duty of the plaintiff and its associate attached on the receipt of the defendant's property, and was to continue until they placed it in the defendant's warehouse. They may recover for each barrel so delivered, but not for any others.

We find no error in any of the conclusions of the court below, and think the judgment rendered by them should be affirmed.

"All concur, except Miller, J., absent."

East Tennessee, Virginia and Georgia R. R. Co.

v.

A. P. Brumley.

(5 *Lea's* [*Tenn.*] *Reports*, 401.)

A railroad company receiving goods for shipment beyond the terminus of its line may, by special contract, protect itself against liability for loss not occurring on its line. And such contract will be presumed from the fact that a clause thus limiting the liability is to be found printed in the bill of lading, even though the shipper's attention was not called to it, if it appears that he had previously shipped like articles and taken like bills of lading.

Appeal in error from the Circuit Court of Greene county. Newton Hacker, J.

Robinson & Maloney for Railroad.

H. H. Ingersoll and W. A. Harmon for Brumley.

Deaderick, C. J., delivered the opinion of the court.

This is an action brought by Brumley against the railroad company to recover the value of staves lost, which were shipped by him to Peters & Reed, Norfolk, Va. The parties waiving a jury, the circuit judge rendered judgment in favor of plaintiff below, from which the company has appealed to this court.

The facts are, as found by the court and as they appear in the record, that in October, 1874, Brumley shipped a car load of staves from Greeneville, Tenn., to Norfolk, Va.; that 4,822 staves were loaded at Greeneville, and 932 less were received at Norfolk; that the Virginia road charged $23.51 in excess of the usual rates of freight upon its line, because the car contained, when received at Norfolk, over weight in staves to that amount. So we have a loss in the number of staves, and yet a large increase of their weight, as estimated at the shipping point. This excess of charges was made, collected and retained by the Virginia road. The staves went through to Norfolk on the car in which they were placed in Greeneville, and which belonged to plaintiff in error.

The shipper took a receipt for the staves, in which it is stated that the E. T., Va. and Ga. R. R. received the car load of staves, estimated at 20,000 lbs. and subject to correction, of said Brumley, to be transported over said railroad to Bristol, subject to the following conditions. Then follow certain limitations of said company's liabilities, printed in smaller type, which are in substance that said company is only liable for such injuries as occur while the articles are in its possession, and that their liability shall cease when delivery is made to connecting roads, or at the end of its rails, etc.

It also appears that the car in which the staves were shipped was a close, locked box car, and that it arrived at Bristol and was transferred there unopened to the connecting road.

Upon these facts the court held defendant liable, holding that the handing of the receipt to Brumley by the railroad agent without calling his attention to the restrictive clauses, with the other facts in the case, did not constitute such a special agreement as would limit defendant's liability to its own road.

Plaintiff below stated that he had been shipping staves three or four years before the car load in question had been shipped, and had shipped fifteen or twenty car loads in all. He says his attention was not called to the clauses limiting the company's liability, but he can read print and writing. He does not say he did not know of such limitations in the contract. The original receipt is made an exhibit and shows that defendants only undertook to transport the staves to Bristol, its eastern terminus, and shows their destination to have been Norfolk, Va.

It is argued that the plaintiff had sold the staves to Peters & Reed at that place, and was to pay the freight there, and therefore could not maintain this action. It is true that plaintiff had an

executory contract to deliver the staves, but his consignees were not bound to pay for them unless received by them. And until they were delivered they were at his risk, and he might maintain an action for failure to deliver. 1 Cold. 272; 1 Head, 158; 2 Gr. Ev., sec. 212.

But the question mainly discussed and upon which the case must turn, is whether the court was in error in holding that the limitations of the bill of lading, or receipt, did not relieve defendant from liability for loss occurring on the connecting road. The undertaking upon its face, plainly printed and written, is to deliver the staves at Bristol "subject to the following conditions," then follow, in smaller but entirely legible type, four conditions upon which the road is exonerated from liability, one of which is that the liability of the road ceases when delivery is made to connecting road. Plaintiff having received similar receipts for other car loads of staves, the presumption is he knew the contents of the one in question. This delivery is shown to have been made at Bristol.

In 7 Heiskel, 257–8–9, it was held by this court, if a railroad company receives goods for transportation beyond the terminus of its own road, to be transported over a connecting road, it will be held liable for delivery at their destination, unless its liability is limited by express contract. But if by its contract its liabilities only extended to the terminus of its own road, it was bound then to deliver to the next carrier, citing 1 Cold. 276. See also 6 Heis. 208.

So also it was held by this court in a late case, that a railroad company, as a common carrier, might exempt itself from loss, upon its own road, by contract upon sufficient consideration, other than such as resulted from negligence or bad faith, and that a lower rate of freight, or through transportation beyond its terminus, not conceded except upon those terms, is a sufficient consideration. And in that case a stipulation against liability for loss by fire was upheld. 2 Lea, 288. In this case there is no common law liability for losses sustained upon other roads. Whatever obligation there may be to make such losses good must result from contract.

The E. T., Va. and Ga. road cannot be held liable for the negligence or failure to perform its duty, of a connecting road, unless it assumes to do so expressly or by implication. It may protect itself against such liability by contract, as has been done in this case. The fact that they are connected, and for their mutual convenience collect freight for each other, upon goods delivered on their respective lines, does not of itself make them liable for the defaults of each other.

We are, therefore, of opinion that the judgment of the circuit judge must be reversed and judgment entered here for plaintiff in error.

See note, 3 Am. & Eng. R. R. Cas. 271.

MARSH

v.

UNION PACIFIC RY. CO.

(*U. S. C. C., Colorado Dist., January* 11, 1882.)

The lien of a common carrier on goods transported depends on the contract with the owner. Ordinarily the law implies such lien, and it will be held that, in delivering goods to be carried, the owner assents to the condition that the carrier may retain possession of the goods until his reasonable charges have been paid, although nothing may be said on the subject. But when goods are sent, not according to the contract with the owner, but by some other route, there is no lien for freight money. Nor in case of prepayment of the freight upon contract for through rate.

A common carrier receiving goods from another carrier with knowledge that a through contract has been made, and the price of transportation to the point of destination paid in advance, can assert no lien on such goods for transporting them over its line.

Trover lies for the value of goods illegally withheld under claim of lien for freight money.

In such an action the plaintiff is a competent witness to testify as to the value of the goods, though he may not know the market value of such goods at the place of delivery. Perhaps the best way to arrive at the value of such goods would be to show the price in the market of new goods of the same character, and then show, as nearly as possible, the extent of depreciation from use. But such course is not open to a plaintiff when the defendant retains possession of the goods. In the matter of values, as in other matters, the law will give relief according to the injury, on the best testimony that can be obtained.

When there is reason to believe the amount returned by the jury is larger than the reasonable value of the property, plaintiff may be required to elect between an abatement of part thereof, or submit to a new trial. Electing to abate, new trial will not be ordered.

IN April last, at Zanesville, Ohio, plaintiff made a contract with the Pittsburg, Cincinnati and St. Louis Ry. Co. to convey for him a car-load of household goods from Zanesville to Denver, for the sum of $185, then paid to said company. The car was brought to St. Louis by that company, and from St. Louis to Kansas City by the Wabash, St. Louis and Pacific Ry. Co., and from Kansas City to Denver by defendant. At Denver defendant demanded an additional sum of $15 freight money, claiming that its charge for conveying a car-load of such goods from Kansas City to Denver was $100, and, as it had received only $85 from the Wabash Co., the sum of $15 was still due from plaintiff. Some discussion ensued between defendant's agent and plaintiff, in the course of which the agent was told by plaintiff that a through rate to Denver was paid on the car, and defendant refusing to deliver the goods until

the $15 should be paid, and plaintiff refusing to pay, this action of trover was brought to recover their value.

At the trial there was evidence to the effect that the Pittsburg Co. had authority from defendant to make through contracts for carrying freight to points on the line of defendant's road, at the rates given in the schedules published by defendant. In this instance, however, the rate was fixed on a joint schedule, published by the Wabash Co. and the Missouri Pacific Co., each of which has a road extending from St. Louis to Kansas City. This schedule gave through rates to Denver and other points in the West, the authors of it apparently assuming to add to their own the rates of other roads connecting with their roads at Kansas City.

Some discussion has arisen at the Bar upon the amount due the Wabash Co. under the schedule for carrying the car from St. Louis to Kansas City, and whether the schedule was properly understood by the Pittsburg Co., but it is not necessary to state it, as the point was not put before the jury. The bill of lading or manifest under which the Wabash Co. brought the car from St. Louis to Kansas City was not put in evidence. From all that could be gathered at the trial it would appear that it was not the practice to send a bill of lading with the car from the place of shipment to destination. But something called a transfer sheet was delivered with the car by each company to its successor in the line of travel. And there was evidence tending to prove that the transfer sheet contained no other information of a through contract for carrying the car than the place of shipment and the amount of money turned over with the car. The manifest, sent with the car from Kansas City to Denver by defendant's agent, contained these words, in brackets, "Will remit $85—to apply," and the fact that $85 was paid to defendant by the Wabash Co. on account of the transportation of the car was not denied; several witnesses testified that it was a rule with defendant to demand payment in advance for carrying household goods, and this was not controverted.

The goods in the car were furniture, beds and bedding, carpets, crockery, pictures, books and other articles usually kept for family use. Plaintiff had used them in his house at Zanesville for several years, and was removing them to Denver, with a view to establish his residence at that place, and to make use of the goods in his house. At the trial he offered himself as a witness to prove the quality and value of the goods. As to his knowledge of values in Denver, he testified that he had occasionally inquired at a second-hand store for the price of furniture and other articles there exposed for sale; that he attended a sale by auction of second-hand goods made by an assignee; that he had bought some articles of furniture for household use, but he had no general knowledge of the value in Denver of new or second-hand goods of the kind and quality shipped in the car.

Defendant objected that he was not competent to testify as to the value, but the court overruled the objection and received the testimony.

In the course of plaintiff's examination it became apparent that his ideas of values were derived mainly from the original cost of the articles at Zanesville. In some instances he claimed to have knowledge of the value of new goods of the same kind in Denver, but in great part he relied apparently on the original cost, deducting something, not very much, for wear and tear. He frequently spoke of "the value to him" and "the value to him to wear out," thus distinguishing between the value in market as second-hand goods and to the owner for use. Defendant's counsel contended that this was a sentimental value—pretium affectionis—arising from long possession and use of the articles. There was nothing, however, to indicate that the words were used in that sense except that there were several portraits of members of his family in the lot. And as to them, the plaintiff did not express an extraordinary value, but was apparently relying on the cost of them. In the aggregate, he fixed the value of the goods at something over $2700. No other witness was called by plaintiff to prove the value, and no testimony was offered by either party as to the value in Denver of new goods of the same kind and quality. Defendant did not assert or claim that plaintiff had gone beyond the cost of new goods of the same kind in his estimate of value.

Two dealers in second-hand goods, of large experience in Denver, were offered by defendant. They had examined the goods, not very carefully, but so as to make an estimate of their value. They thought the goods were worth to the owner, for use, $725; for sale as second-hand goods, about $400.

The charge to the jury was as follows:

"The plaintiff brings this action, gentlemen, to recover the value of goods which have been described in the evidence, upon the ground that they were wrongfully detained by the railroad company, the defendant. The defence is, that the company had a lien upon the goods for unpaid freight charges, and a right to detain the goods until the charges should be paid. If there was any such lien, the company, of course, could hold on to the goods until their charges were satisfied. And that is the principal question to be decided, whether there was or was not any such lien upon the goods.

"It is in evidence before you that the goods were shipped from Zanesville, in the State of Ohio, on the Pittsburg, Cincinnati and St. Louis Ry., to this place, and that the plaintiff, at the time of shipment, paid what was demanded as a through rate for the goods to this point—that is, the full amount as given by the Pittsburg, Cincinnati and St. Louis Ry. Co. as the charges for transporting the goods to this place. If the Pittsburg Co. had authority from the defendant here to make contracts in its behalf, that contract,

of course, would be as binding upon this defendant, the Union Pacific Ry. Co., as it was upon the Pittsburg Co. But I do not think that there is any evidence before you to show that it had such authority. The evidence is contained in these depositions, that it is the practice of railroad companies to make contracts for carrying goods to distant points upon the published rates, the tariff of charges as published by the different companies in the line of transportation—that is, they would take the charges on their own line, and the charges of the Wabash, if that is the other company that would carry from the terminus of the Pittsburg Co's. line to Kansas City, and the tariff of the Union Pacific Co., and make up the amount from these several tariffs.

"Now, the evidence is, that, in this instance, they took the tariff of charges as published by the Missouri Pacific and the Wabash roads, that have lines extending from St. Louis to Kansas City, and it seems that they had put out a schedule in which they had fixed the rate to points in this city and elsewhere in the West. But it is plain enough that the Wabash Co. and the Pacific Co. could not fix rates for the Union Pacific Co., and as this rate was fixed upon the schedule published by these two companies, the Wabash and the Missouri Pacific, it does not follow from that at all that the rate, as published by the Union Pacific for this part of the line of transportation, was used in making up the aggregate price for bringing the goods to this place. It may be the rate, but there is no evidence to show that it is the rate.

"Now, upon that, we are able to say that it does not affirmatively appear that the Pittsburg Co. had authority from this defendant to make contracts of this character; and so we must ascertain whether there is any other ground on which the defendant may be liable, and upon that I am of the opinion, that if the Pittsburg Co. did, in fact, fix a through rate, and receive pay for that, and this defendant, or its agents and officers, at the time of receiving the goods, had information of that fact, that a through rate had been paid, that may be sufficient. It is not necessary that the amount paid should have been that charged by the Union Pacific Co., nor is it necessary that the Union Pacific Co., or its officers or agents, at the time of receiving the car, should have known what was paid. But the circumstance that a through rate had been paid —in other words, that a contract was made with the Pittsburg Co. for transporting the goods from Zanesville, Ohio, to Denver, and that they had been paid for it; for if that is true, if, knowing that, they received the goods and transported them, they knew, at the time of receiving them, and at the time of transporting them, that the plaintiff was acting upon the theory, upon the hypothesis, that the goods were paid through in sending them from Zanesville. They knew, of course, if that is true, that in delivering the goods in the first instance to the Pittsburg Co. for transportation, he had

assumed that the charges were paid, and, upon that, I do not think that any contract can be implied which would give to this defendant a right to assert a lien against the goods for any amount that may be due them, even if the amount received by the Pittsburg Co. was not sufficient to pay their rate. Because, when a party delivers goods to a railroad company, and makes a contract for transporting them to destination, to the place where he wishes to send them, and, at the same time, pays the amount demanded, it cannot be said that he has agreed that anything additional shall be charged to him, and that any of the carriers in the line of transportation shall have a lien upon the goods for such charges. By paying in advance the sum which is demanded, he completes, he fulfils, the contract on his part; it is all that is required of him, and it cannot be said afterwards that he has assented to the right of any company to charge his goods with a lien in respect to the carriage of them, and that, although a mistake may have been made in respect to the amount to be charged. So that the important question, as it seems to me, for your consideration, is, whether, at the time of receiving these goods, and forwarding them to this place, the agents and officers of this defendant knew that a contract had been made for transporting the goods through to this point, and payment had been made in accordance with that contract. Now, upon that, the evidence is, that, at the time these goods were turned over, that some money, $85, it is said that that was not sufficient, but $85 was turned over by the Missouri Pacific, or whatever company it was that brought the goods from St. Louis to Kansas City, to this company; and it is also said in some of these depositions, it was the usage and custom of the company to require prepayment upon this class of goods. That also is in testimony. If, upon this testimony, you believe that the agents and officers of the defendant company knew, at the time these goods were received, that a contract for carrying them to this place had been made, and that payment had been made for carrying them through to this place, that is enough. If you find they had no such knowledge, then your finding will be for the defendant.

"With that explanation, there is only one other thing, and that is the value of these goods. The counsel have asked me to say that the value of the property in controversy is what the goods are shown, by the testimony, to be worth in this market, and not what the plaintiff testifies they would be worth to him to wear out. That is a correct proposition, so far as it states that it is the value of the goods in this market, for this is the place of the conversion, if there was any conversion. But it is the value of the goods to the plaintiff, and for use to him, perhaps not what he considered them to be worth to him, not his estimate of their value, but what they were worth to him, and for the purpose of their intended use to him, and it is not the value of the goods in a second-hand tore,

because, as we all know, goods of this class are of very little value in such places as that; not what they would sell for out of one of these establishments on the street, but what the goods were reasonably worth to the plaintiff, for the purpose for which he intended to use them, to him as the owner of them, as the person who intended to make use of them in his household affairs.

"I would like you to distinguish, if possible, between the estimate he may place, any sentimental value he may attach to them as things he may have owned for a long time, and all that, and the value which may be given upon the street, or amongst dealers. I don't think it is either one or the other; it is not the peculiar value the owner may attach to them on account of the service they have rendered to him, nor is it the value for which they would sell in the market as things that are somewhat worn, and which are not very salable under the most favorable circumstances. It is something between these different values. It is the value which the owner may find in them, using them in the ordinary course of his affairs, and which every one has, in so far as one is a housekeeper, in the goods, furniture in his house; the value to him for that use. If you can come to some conclusion upon that, that is the measure of damages.

"I do not know, gentlemen, that there is anything more to be said to you."

Defendant's counsel asks the Court to instruct the jury that the burden of proof to show that this contract had been made, is upon the plaintiff, and no failure on our part to produce any evidence can be taken in his favor; he must make out a special contract had been made.

The Court: "That is true, gentlemen, the burden is upon the plaintiff to establish everything essential to recovery. There is no question upon any point as to the making of the contract; that is clearly enough shown, the making of the contract and the shipment of the goods. Upon this question, as to whether the defendant company knew, at the time of receiving the goods, that a through contract had been made to Denver, and payment made in accordance with the terms of that contract, the fact must appear to you by a preponderance of testimony; the weight of the testimony must be on that side to enable the plaintiff to recover."

The jury returned a verdict for plaintiff, assessing damages at $2,000.

Defendant moved for new trial, alleging error in receiving plaintiff's testimony as to the value of the goods, in the charge to the jury, and that the damages are excessive.

HALLETT, J.—The lien of a carrier for freight money on the goods transported by him depends on the contract with the owner. Not that it is necessary that the lien should be mentioned in the

contract, but there must be a contract for carriage on which it may rest. In the ordinary course of business, goods delivered for carriage are subject to the condition implied by law that the carrier may retain possession of them until his reasonable charges shall be paid. In delivering them to be carried, the owners assent to that condition, although nothing may be said on the subject, and thus it becomes a part of the contract—just as, in the absence of agreement as to price, the law will imply that it shall be reasonable. On this principle it is settled that a wrongdoer cannot confer on the carrier the right to assert a lien against the true owner. And when goods are sent, not according to the contract with the owner, but by some other route, there is no lien for freight money. Fitch *v.* Newbury, 1 Doug. (Mich.) 1; Robinson *v.* Baker, 5 Cush. 137; Stevens *v.* Boston and Worcester R. R., 8 Gray, 262. Because the owner cannot be divested of his property without his consent, and to allow a lien on the goods in a matter to which he has not assented, would divest him of his property to the extent of the lien.

To apply the rule to the present case, it is only necessary to say that, in the contract with the Pittsburg Co. plaintiff did not in any way consent to have his goods charged with a lien for carrying them to Denver. It was not an agreement to pay, and that his goods should be held until he should pay, but he did in fact pay the price of carrying the goods, and as to him, the contract was fully executed before the goods left Zanesville. Plaintiff paid the price demanded of him, and all that was demanded for carrying the goods, and it would be absurd to say that he assented to a lien on his goods for the same thing—the money which he had already paid.

But it is said that the Pittsburg Co. had no authority from defendant to fix the price of carrying the goods in the way that it was done—on the schedule published by the Wabash and Missouri Pacific Co's. And so the Court ruled at the trial, without referring to defendant's rule that for carrying household goods payment must be made in advance, under which it might be claimed with reason that the company first receiving the goods was defendant's agent to fix the rate and receive the money. This point was not stated to the jury, however, and they were advised that the Pittsburg Co. was without authority from defendant to make the contract. The jury was also instructed to find whether the goods were received by defendant at Kansas City with knowledge that a through contract had been made by the Pittsburg Co., and the price paid for carrying them. Of that there was ample evidence in the rule of defendant requiring pre-payment on household goods and the fact that $85 was paid to defendant by the Wabash Co. on account of freight money. Some of defendant's witnesses say that the payment by the Wabash Co. is of no weight, as

freight money is often advanced by shippers when a through contract has not been made, and it would be impossible to determine whether the money was paid on a through contract or as an instalment of freight money. This means that money is paid in both ways, and leaves the payment by the Wabash Co. to stand as affording some evidence of a through contract. Taken in connection with the rule requiring payment in advance on household goods, it was sufficient to warrant the finding that defendant received the goods with knowledge that a through contract had been made for carrying them to destination.

And if defendant was advised of the terms of the contract before it performed the part assigned to it, there would be force in the suggestion that by such performance the contract was accepted. It is not necessary, however, to go so far, for the fact that a through contract and payment was made, and that defendant had knowledge of it, is enough to defeat the lien.

Independently of that circumstance there may be room for debate whether one who has paid the price of carriage can be further charged in respect to the same matter; whether all companies who have a part in the contract and perform that part shall not be regarded as accepting the contract; whether any of the companies in the line of transportation after the first shall be taken to be the agent of the shipper to make a new contract for him, when, by acting for himself, he has practically denied the authority of another to act for him. But these are points with which we are not now concerned. The jury have found, upon sufficient evidence, that defendant received the goods with knowledge of the fact that a through contract for carrying them had been made, and that plaintiff had paid for the service, and that, of itself, displaces the lien on which defendant relies.

This is enough to show that the action may be maintained; for trover lies for the value of goods illegally withheld under a claim of lien for freight money. Adams *v.* Clark, 9 Cush. 215.

Objection is made to the plaintiff as a witness to prove the value of the goods, on the ground that he had no knowledge of the market for such goods in Denver. Many cases are cited to the point that the market price in the place of conversion must control; a proposition which cannot be controverted. Whenever it appears that there is anything like an established price in the market, for which the articles in controversy can be replaced, that price will measure the damages for converting such articles. But for household goods more or less worn, there is no established price, unless it be that at which second-hand goods of the same kind are sold. And although people who discontinue housekeeping may be compelled to accept that price, no one will contend that it is the full value of the goods. The fact that goods in use, if sold at all must be sold at a sacrifice, is too plain for argument, and

therefore the price of such goods in market will not be adequate compensation to one who is deprived of his goods by a wrongdoer. Perhaps the best way to arrive at the value of such goods would be to show the price in market of new goods of the same kind, and then show, as nearly as possible, the extent of depreciation from use. But this course was not open to plaintiff, for the goods were in defendant's possession, probably not in a condition to be examined, and plaintiff was not bound to inquire whether he would be allowed to send witnesses to inspect them. If it is suggested that a dealer, hearing a description of the articles, would be able to fix their value, the answer may be that few persons would be able to give a description which can be understood. The average man would find himself very much embarrassed in any effort to describe furniture and other articles of household use definitely, so as to enable one who never saw them to judge of their value. No one in Colorado knew anything of these goods, and among plaintiff's acquaintances in Zanesville he could not expect to find any one more competent than himself to testify as to their value. On the whole, it would seem that if plaintiff's testimony as to value cannot be accepted, he will be defeated of his right, and that will not be allowed. In the matter of values, as in other matters, the law will give relief, according to the injury, on the best testimony that can be obtained. Stickney *v.* Allen, 10 Gray, 352; Starkey *v.* Kelley, 50 N. Y. 676.

On the other hand defendant being in possession of the goods was in a position to prove their value in a manner which would dispel all doubts. It attempted to do this, but the evidence is not very satisfactory. The goods were not in a condition to be examined with care, and defendant's witnesses did not give the attention necessary to correctly estimate their value. Evidence of the value in this market of new goods of the same kind which would have enlightened the jury was not offered by either party, and if the verdict is wrong the fault is not wholly with the jury. There is, however, some reason to believe that the amount returned is large, and plaintiff will be required to remit $500, or submit to a new trial.

The evidence of value offered by defendant was probably entitled to greater weight than was allowed to it, although it cannot be said that it should control. If the plaintiff will remit from the damages the sum of $500, the verdict may stand, otherwise a new trial will be allowed.

Plaintiff remitted the $500, and judgment was entered for $1,500.

J. W. Horner, for plaintiff.

Willard Teller, for defendant.

SUTHERLAND

v.

SECOND NATIONAL BANK OF PEORIA.

(78 *Kentucky Reports*, 250.)

A consignor of goods, after they have passed from the hands of the railroad company with which the contract of affreightment was made, into the hands of another company, has the same right to change their destination while in transitu, by taking a new bill of lading, as if the first company had a continuous line to the place of destination.

Such new bill of lading is valid, when called in question between a bona fide holder and one claiming a lien by virtue of an attachment.

The service of an attachment upon a railway company creates no lien upon property not within the county at the time it is served.

R. & L. BUCHANAN, for appellant: There had been no valid pledge of the grain to the appellee, and if there had been, still the appellants' attachment gave them a prior lien upon it. 2 T. R. 75; 70 Eng. C. L. R. 687; Abbott on Shipping, 323; 4 Denio, 489; Lam *v.* Robinson, 18 B. Mon. 632; 2 Met. 287; 2 Duv. 485; 9 Bush, 119; Civil Code, subsec. 3, sec. 203, sec. 212; 24 Penn. R. 23.

W. O. & J. L. Dodd for appellee: Bartlett & Co. had the right to change the destination of the grain while it was in the hands of the Ohio and Mississippi Ry.

The attachment held nothing, because the oats were not within the county at the time of service. 4 Bush, 334; Davis *v.* Watts, MS. Opin. 1876; 24 Penn. Rep. 23; 1 Barr, 223; 51 Penn. 244; 4 Kansas, 378.

COFER, J.—January 2, 1879, the appellant brought this suit in the Louisville Chancery Court against S. C. Bartlett & Co., non-residents of the state, and sued out an attachment against their property. The order of attachment was executed on that day on the Ohio and Mississippi Ry. Co. by delivering a copy thereof to its agent in the city of Louisville, and by summoning the company as a garnishee, but without giving to the company a notice specifying the property attached. January 4th an alias attachment was issued and placed in the hands of the marshal, who on the 8th levied it on one car-load of oats in the possession of the Ohio and Mississippi Ry. Co. The marshal took the oats into his possession, and it was subsequently sold under order of the court. Subsequently the appellee filed its petition, claiming that it had a lien on the oats.

The pleadings and evidence disclose the following facts:

December 24, 1878, S. C. Bartlett & Co. delivered a car-load of oats to the Peoria, Pekin and Jacksonville R. R. Co., at Peoria, Illinois, consigned to the appellant at Louisville, and took from the railroad company a through bill of lading. They then drew upon the appellant against the shipment, and he declined to honor the draft. Being informed of that fact by telegraph, Bartlett & Co. caused the oats to be stopped in transitu on the second day of January, and on that day surrendered to the railroad company the bill of lading, and took another, consigning the oats to "S. C. Bartlett & Co., notify Verhoff & Strater, Louisville, Ky." They then drew on Verhoff & Strater, and attaching the bill of lading to the draft, on the third of January sold the draft to the appellee, who had no notice of the attachment of the appellant at Louisville.

The appellee transmitted the draft to Louisville, but Verhoff & Strater refused to honor it, assigning as a reason that the oats had been attached, and they did not wish to become involved in the controversy.

Upon these facts the court below adjudged in favor of the appellee, but allowed the marshal's costs for selling the oats to be deducted from the proceeds, and refused to render judgment against the appellant on a counter-claim for damages for the illegal seizure of the oats. From that judgment both parties appeal.

Counsel for the appellant contend that, at the time the second bill of lading was issued, the oats had passed out of the possession of the Peoria, Pekin and Jacksonville R. R. Co. into the possession of the Ohio and Mississippi Co., and therefore the new bill of lading was invalid and ineffectual to invest the bank with a valid lien on the oats.

As authority in support of this position, counsel cites that class of cases in which it has been held that a bill of lading signed by the master of a vessel before receiving the possession of the goods does not bind the owners.

Those cases are not analogous to this. The oats had been received by the railroad company to be forwarded to Louisville, and was in the custody of the Ohio and Mississippi Co. when the new bill was signed. The possession of the latter company was held under and by virtue of the contract of affreightment made with the Peoria, Pekin and Jacksonville Co., and the consignors had the same right to change the destination of the oats while in transitu that they would have had if the company receiving the oats from them had had a continuous line to Louisville. There is no question here between the consignor or consignee and the carrier, and no reason is perceived why the new bill of lading is not valid when called in question between a bona fide holder and one claiming a lien on account of an attachment against the goods of the consignor.

The bill of lading authorized the holder to demand the oats from

the carrier, and, being a recognized symbol, its delivery to the bank was a symbolic delivery of the oats, and constituted a valid pledge.

But it is contended that the service of the first order of attachment on the Ohio and Mississippi Ry. Co. created a lien on the oats then in its possession, and as that service was prior in time to the pledging of the oats by the delivery of the bill of lading to the bank, the appellant has the eldest and superior lien.

At the time the first order of attachment was served S. C. Bartlett & Co. were non-residents of the state, and the oats was in the state of Illinois. No personal service could be had upon the defendants, nor could the goods be seized under the order of attachment. The consignors still had the right to stop the oats in transitu or to alter its destination, and, in our opinion, the service of the attachment on the railway company while the oats was beyond the limits of this state created no lien. True, the Ohio and Mississippi Ry. Co. was within the jurisdiction of the court, but the property sought to be reached was without its jurisdiction and the laws of the state, and the process of the courts here could not reach it nor compel the carrier to bring it hither; and as the court would have had no power to subject the property unless brought within its jurisdiction, its process could not create a lien upon it until it came within the county where the order of attachment was in the hands of the officer.

Counsel cite the case of Childs *v.* Digby (24 Penn. St. 23) in support of a contrary conclusion, but that case was overruled in Pennsylvania R. R. Co. *v.* Rennock (51 Penn. 244).

The alias order of attachment, issued on the fourth of January, was in the officer's hands when the oats arrived in Louisville on the 6th, and was levied on the 8th, and created a valid lien, subject, however, to the prior lien of the bank.

It results from this conclusion that the seizure of the oats under the attachment was wrongful, and as the proceeds were not sufficient to pay the debt for which the bank had a lien, the court erred in allowing the marshal's fee to be retained out of the price. He made the seizure and sale at appellant's instance, and must look to him for his costs.

The bank had no right to set up a counter-claim in this case for the damages resulting from the seizure of the oats; but as the judgment dismissing the counter-claim absolutely will be a bar to a suit to recover such damages, the judgment must be reversed on the cross-appeal, and the cause is remanded, with directions to cause the whole proceeds of the sale to be paid over to the bank, and to dismiss the counter-claim without prejudice.

See Bloomingdale *v.* Memphis, etc., R. R. Co., and note, post

Bloomingdale, Rhine & Co.

v.

Memphis and Charleston R. R. Co.

(6 *Lea's Reports, Tenn.* 618. *April Term*, 1881.)

B., R. & Co. sold and shipped to V. R. & H., on September 22, 1875, on four months' time, a bill of goods. They telegraphed M. & Bros. to stop the goods. The telegram was taken to the freight agent of the railroad, who promised to do so and that he would reship them to the sellers, who were notified. The goods were afterwards, by mistake or negligence, delivered to V. R. & H., who failed on the 23d December following. Upon maturity of the account B., R. & Co. brought suit against V. R. & H., recovered judgment, but failed to make their debt, the property of the debtors being absorbed by prior judgments. B., R. & Co. sued the railroad company for wrongfully delivering the goods. *Held:*

The notice was sufficient. There need be no express demand. The notice is sufficient, if the carrier is clearly informed that it is the intention and desire of the seller to exercise the right of stoppage in transitu.

It is not required, when the right of stoppage in transitu is exercised, that the buyer should have been declared a bankrupt or insolvent by legal proceedings, or that he should have made an assignment, but insolvency fairly means that the party should be shown to have been unable to meet the debt due the seller, at the time of the exercise of the right, when the debt should fall due. The purchaser may not have actually failed or have gone to protest, but might be hopelessly insolvent. But the objection that the purchaser was not insolvent at the time of the stoppage can only be taken by the purchaser and not by the carrier, except that he may show as a matter of defence that the debt could have been made by due diligence.

The bringing suit upon the debt when due and recovery of judgment, does not estop the seller from suing the carrier for wrongful delivery.

Appeal in error from the Circuit Court of Shelby County. C. W. Heiskell, J.

T. B. Edginton for plaintiffs.

Humes & Poston for defendants.

Freeman, J.—This is an action brought before a justice of the peace originally, in Memphis, to recover from the railroad company the value of goods, which had been sold by plaintiffs to Van Ronkle & Heiliger, a firm doing business in the city of Memphis.

The facts are, that plaintiffs sold a bill of goods to said firm in the city of Philadelphia, on the 22d of September, 1875. Some days after the goods were shipped by rail to the purchasers, the sellers learning on inquiry of other merchants, that the firm of Van Ronkle & Heiliger were doubtful as to solvency, and that other parties were refusing to ship goods to them, telegraphed Menken & Bros., of Memphis, to stop the goods, if not delivered,

on their arrival. This telegram was taken to the general freight agent of the railroad, and he promised to do as requested. He afterwards wrote to Menken & Bros. that he would reship them to the plaintiffs at Philadelphia, on same terms as to freight they had been charged for when shipped from that place. This letter and these facts were immediately, on the 8th day of October, 1875, sent to plaintiffs, who thereupon relied on defendant to do what had been promised.

The goods, however, were in a few days after this, as stated by the freight agent, by mistake of his orders, by some employee of the company, delivered to the consignees, and plaintiffs thereby lost the possession, which would have accrued to them, had their orders been obeyed as to retention of the goods, and the company complied with their agreement to retain the goods, or reship them.

On the 23d of December after this, the firm of Van Ronkle & Heiliger went to protest, and immediately thereafter attachments were issued and levied on all their property, the same sold under judgments rendered in these cases, and failed to pay all their debts, leaving plaintiffs' debt unpaid.

The goods were sold originally on four months' time. Plaintiffs, on the 29th of December, 1875, however, brought suit on their account for $477, obtained judgment, had execution levied, subject to the attachments, but failed to realize their debt by reason of the prior liens. They thereupon brought this suit against the company for the wrongful delivery of the goods. On the trial in the circuit court, under the charge of Judge Heiskell, a verdict was had for defendants, from which there is an appeal in error to this court.

Several questions have been debated before us, some of which, so far as necessary to determine the case, we proceed to dispose of.

There is nothing in the objection, that the notice was insufficient, as given to the agent of the company. Whether sufficient or not, as shown in the proof, the defendant's agent was satisfied with it, and evidently knew its object, which was to exercise the right of the vendor, to stop goods sold while in transitu, and before delivery. Acting on this, the company, by their agent, agreed to retain the goods, and plaintiffs, relying on this promise, were probably prevented from taking more active steps to secure themselves in the exercise of their right to stop the goods. It is too late now for defendants to insist on any defects, if any existed, in the notice given them.

It is settled law, that the seller of goods may exercise the right of stoppage in transitu at any time before the delivery of the goods to the consignee, or a bona fide sale of them to a third person, as by endorsement of the bill of lading in good faith for a valuable consideration. See Wait's Actions and Defences, vol. 5, p. 616,

and authorities cited. It is equally clear that a carrier, upon notice of the exercise of this right, or demand of control of the goods by the seller, is bound not to deliver the goods to the purchaser, and will become liable, as for conversion of the goods, if he decline to deliver them to the seller, or delivers to the vendee; and a notice by the vendor, without an express demand of the goods, is sufficient to charge the carrier. If the latter is clearly informed that it is the intention and desire of the former to exercise the right, the notice has been held sufficient. See Wait, vol. 5, p. 615, and cases cited.

It is clear, on these principles, that the defendant was liable to plaintiffs for the wrongful delivery of the goods to the purchaser, whether purposely or by neglect of their agent, after what had occurred upon the notice given, unless there is some other ground of defence shown in the record.

It is said the seller has the right to stop in transitu only in case of insolvency of the purchaser at the time of the exercise of that right, and so his Honor substantially charged the jury. This might be found as the statement of the rule in most cases, and is certainly substantially correct as between the seller and the buyer; but we think, as between a third party, such as the carrier is in this case at least, no strict proof of insolvency should be required in order to support the right of the seller to resume possession of the goods as against a purchaser of doubtful solvency. In fact it does not lie in the mouth of a derelict carrier to interpose the objection that the right was being wrongfully exercised. He may well show, however, the fact that the party was solvent after the delivery, and that by due diligence the debt might have been made, and therefore the plaintiff was not injured by his wrongful delivery of the goods. But we think, if the purchaser submit to the stoppage of his goods, or does not contest the right, the carrier could not interpose properly the objection that the party was solvent, and therefore the right not properly exercisable by the seller, in case the carrier had improperly converted the goods.

Be this as it may, however, we think the sounder statement of the ground for exercise of the right is, as given by Mr. Wait, vol. 5, p. 614, that "it is not necessary to prove or make out insolvency, that the buyer should have been declared a bankrupt or insolvent by a judicial tribunal, or shown to be so by legal proceedings, or that he should have made an assignment of his property, or the like—but that insolvency, in a case like this, fairly means that the party shall be shown to have been unable to meet the debt due the seller, at the time of the exercise of the right, when that debt should fall due; and if this fact satisfactorily appears, no matter how proven, the law requires no more." See cases cited.

A purchaser may not have actually failed, not have gone to protest, yet it might be clear that he was hopelessly insolvent, and

would be totally unable to pay, in a case like this, when the debt fell due. To require the seller to deliver the goods under such circumstances, would be to require him to throw away his goods—in effect, practically would be to deny him the right to resume possession before delivery—and at the same time there exists a certainty, or a reasonable one at least, that he would never be paid for them—probably a certainty that if delivered they would at once, or in a short time, be appropriated by other creditors. This cannot be the law in such cases, in a system professing to be based on reason and have for its aim the attainment of justice.

His Honor, the Circuit Judge, made the whole case turn with the jury on the question whether the party had been shown to be actually insolvent on the 10th of October, 1875, when the goods were delivered. They did not go to protest until the 23d of December after this, but it is clear from the proof, so far as this record shows, that the parties were in such condition that the seller would have had no prospect of receiving payment for his goods at the time his debt fell due; and this being so, we hold he might well exercise his right to stop them, and resume his possession.

It is insisted, however, that the fact that, after this wrongful delivery, the plaintiffs sued on their account, as for a debt due them for the goods sold, estops them from recovering against the company. This would go on the idea, that the exercise of the right of stopping in transitu is a rescission of the contract of sale, and a suit for the price would be a waiver of this, and an affirmance of the sale.

Our first impression was that this might present some difficulty, but upon examination of the authorities, it seems now well settled, that the exercise of the right to stop is not a rescission of the sale, but simply places the parties, as nearly as may be, in the same situation they would have been if the vendor had not parted with the possession. See Wait, vol. 5, p. 618, and numerous cases cited; also Indermaur's Principles of Common Law, p. 95; 10 M. & Welby, 436, 451, there cited.

The vendor, in exercising the right of stoppage, does not take possession of the goods as his own, but as the goods of the purchaser, on which the vendor has a lien for the unpaid purchase money. Wait, p. 618. It is simply, in other words, a resumption of his possession, the incidents of such possession of goods sold thereby attaching. This being so, it follows that the vendor, thus resuming his possession, may pursue any other remedies he may have to enforce his debt. In a case like the present, the carrier might well have insisted it was his duty to have done so, and probably interposed it as a defence to this action, if the plaintiffs could have made their debt by law, and had failed in diligently prosecuting such legal remedy.

It follows, the court erred in its charge to the jury, and the judgment must be reversed and case remanded for a new trial.

See Wigton v. Bowley, 3 Am. & Eng. R. R. Cas. 328. Stoppage in transitu is an ordinary legal right, as to which a court of equity, unless by reason of some unusual circumstances, will not interfere. Straker v. Ewing, 34 Beav. 147.

The right of stoppage in transitu extends only over the goods themselves and the net proceeds of the sale, and not over the policy-moneys paid in respect of insurances effected by the vendee. Berndtson v. Strang, 3 L. R. ch. 588. A person who is a surety for the purchase money of the goods cannot exercise the right of stoppage in transitu. Siffkin v. Wray, 6 East, 371; Bachellor v. Lawrence, 6 C. B., N. S. 543; De Wolf v. Linsdell, L. R., 5 Eq. 209. See also Lockhart v. Reilly, 1 De G. & J. 464; Phillips v. Dickson, 8 C. B., N. S. 391. The right may be enforced by one who has paid the price of the goods for the vendee, and taken from the vendee an assignment of the bill of lading as security for such advancement. Gassler v. Schepler, 5 Daly, 476.

A principal consigning goods to an agent has the right of stoppage in transitu on the latter becoming insolvent, even if the agent has made advances on the faith of the consignment (Kinloch v. Craig, 3 T. R. 119), or has a joint interest with the consignor. Newson v. Thornton, 6 East, 17.

The right does not exist where the vendor is indebted to the vendee to the full value of the assignment in a precedent debt. Clark v. Mannon, 3 Paige, 373; Wood v. Roach, 1 Yeats, 177.

A merchant in England sent goods of a given value to a merchant at Quebec for sale on his account. Before the goods were sold, or the proceeds ascertained, the latter shipped three cargoes of timber to the former to credit on account; two of them arrived; against the third the consignor drew a bill for the amount whilst it was in transitu; in the interval the consignee dishonored the bill and became insolvent. *Held*, that the consignor had a perfect right of stoppage in transitu, and was not bound to wait until their mutual accounts were finally adjusted. Wood v. Jones, 7 D. & R. 126.

Where goods are furnished to the agent of a bankrupt, on the agent's credit, he may, to protect himself, stop them in transitu, and give them a new direction adversely to his principal; but if he gives them a fresh destination in furtherance of the usual course of business of the principal, they pass to the assignees as in the order and disposition of the bankrupt. Hawkes v. Lunn, 1 Tyr. 413; 1 C. & J. 519.

A. purchased goods of a company, not intending to pay for them. The company delivered them to a carrier to deliver them, according to A.'s instructions, to C. The carrier afterward held the goods for C., at his request, as a warehouseman. A. becoming bankrupt, the company demanded the goods, and the carrier redelivered them, under the mistaken supposition that the transitu was not yet over. In an action for trover against him—*Held*, that an equitable plea of rescission of the contract on the ground of A.'s fraud, to which C. was privy, would raise a good defence to the action, although the fraud was not discovered till the cross-examination of C. at the trial of the action. Clough v. London, etc., Ry. Co., 7 L. R. Exch. 26.

Where the stoppage in transitu is effected by one who is not authorized to act on behalf of the vendor, a subsequent ratification by the vendor will be too late if the transit is ended, and the goods have come into the possession or under the control of the vendee. Bird v. Brown, 4 Ex. 786; Davis v. McWhirter, 40 U. C., Q. B. 598.

In Hutchings v. Nuner, 1 Moore, P. C., N. S. 243, the stoppage was made by the defendant, who had previously done business for the vendor as his

agent. The defendant had written to the vendor informing him of the insolvency of the buyer on March 26, and the vendor, on April 16, enclosed to the defendant a power of attorney to act for him. The defendant, before receiving this power, to wit, on April 21, assumed to act for the vendor, and effected the stoppage. *Held*, by the privy council, distinguishing this case from Bird v. Brown, supra, that the power actually despatched on April 16 was a sufficient ratification of the agent's act done on April 21, although the agent was not then aware of the existence of the authority. See Durgy Cement Co. v. O'Brien, 123 Mass. 12; Reynolds v. Boston, etc., R. R. Co., 43 N. H. 589; Bell v. Moss, 5 Whart. 189; Newhall v. Vargas, 13 Me. 93.

Where the vendor has received part payment for the goods he will still have the right of stoppage in transitu for the balance of purchase money due. Newhall v. Vargas, 13 Me. 93; Hodgson v. Loy, 7 T. R. 449; Feise v. Wray, 3 East, 93; Edwards v. Brewer, 2 M. & W. 375; Van Casteel v. Booker, 2 Ex. 702. The right will not be lost by his receipt of notes or bills of exchange as conditional payment, even though he may have negotiated the bills so that they are outstanding in third hands. White v. Welsh, 396; Arnold v. Delano, 4 Cush. 53; Donath v. Bromhead, 7 Pa. St. 301; Hays v. Monille, 14 Pa. St. 148; Bell v. Moss, 5 Whart. 189; Newhall v. Vargas, 13 Me. 93; Dixon v. Yates, 5 B. & Ad. 345; Kinloch v. Craig, 4 Brg. P. C. 47; Feise v. Wray, 3 East, 93; Edwards v. Brewer, 2 L & W. 375; Patten v. Thompson, 5 M. & S. 350; Hodson v. Loy, 7 T R. 440; Miles v. Gorton, 2 C. & M. 504; Lewis v. Mason, 36 U. C., Q. B. 59.

But where the vendor has taken the vendee's acceptance in full payment, the goods cannot be stopped in transitu, unless the acceptances have been dishonored. Davis v. Reynolds; Rucker v. Donovan, 13 Kan. 257 Eaton v. Cook, 32 Vt. 58.

A. being indebted to B. on balance of accounts, including bill still running, accepted by B. for A. consigned goods to B. on account of this balance. *Held*, that A. had a right to stop the goods in transitu upon B. becoming insolvent before the bills were paid. Vertue v. Jewell, 4 Camp. 31; compare Patten v. Thompson, 5 M. & S. 350; Kinloch v. Craig, 3 T. R. 786; Wood v. Roach, 1 Yeates, 177; Clark v. Mauran, 3 Paige, 373; Wood v. Jones, 7 D. & R. 126.

If only a part of the goods are delivered, the right of stoppage in transitu will exist as to the balance. Dixon v. Yates, 5 B. and Ad. 313; Tanner v. Scovell, 14 M. & W. 28; Buckley v. Furniss, 15 Wend. 137 Cabeen v. Campbell, 30 Pa St. 264; White v. Welsh, 38 Pa. St. 396. But stoppage of a portion of the goods will not affect the claim of the vendee to a portion of the consignment which comes into his possession. Wentworth v. Outhwaite, 10 M. & W. 436. But the delivery of a part will not operate as a delivery of the whole, or preclude the right of the vendor to stop any portion not actually reduced to possession by the purchaser. Mohn v. Boston, etc., R. R. Co., 106 Mass. 76; White v. Welsh, 38 Pa. St. 396; Buckley v. Furniss, 17 Wend. 504; Mills v. Gordon, 2 C. & M. 509; Tanner v. Scovell, 14 M. & W. 28.

The essential feature of a stoppage in transitu is that the goods should be at the time in the possession of a middleman, or of some person intervening between the vendor who has parted with, and the purchaser who has not yet received them. Schotsman v. Lancashire, etc., Ry. Co L. R., 2 Ch. App. 332.

The goods are liable to stoppage so long as they remain in possession of the carrier. Mills v. Ball, 2 B. & P. 457; James v. Griffin, M. & W. 623; Lickbarrow v. Mason, 1 Smith's L. C. 699; Reynolds v. Boston, etc., R. R. Co., 43 N. A. 591; Atkins v. Colby, 20 N. H. 154; White v. Mitchell, 38 Mich. 390. See Wigton v. Bowley, 3 Am. & Eng. R. R. Cas328.

A delivery, actual or constructive, of the goods to vendee or his servant or agent will defeat the right of stoppage in transitu. Ogle v. Atkinson, 5 Taunt. 759; Bolton v. Lancashire, etc., R. R. Co., 1 L. R., C. P. 431; Turner v. Liverpool Docks Co., 6 Ex. 548; Van Casteel v. Booker, 2 Ex. 691; Ellis v. Hunt, 3 J. R. 464; Dixon v. Baldwin, 5 East, 175; Benedict v. Schaettle, 12 Ohio St. 521; Covel v. Hitchcox, 23 Wend. 611; Buckley v. Furniss, 15 Wend. 137; Mottram v. Heyer, 5 Denio, 629; Harris v. Pratt, 17 N. Y. 249; Aguirre v. Parmelee, 22 Conn. 473; Moses v. Boston, etc., R. R. Co., 24 N. H. 71; Smith v. Nashua R. R. Co., 27 N. H. 86; Clark v. Meedles, 25 Pa. St. 338; McCarthy v. N. Y., etc., R .R. Co., 30 Pa. St. 247; Wood v. Crocker, 18 Wis. 345; Alabama, etc., R. R. Co. v. Kidd, 35 Ala. 209; Michigan, etc., R. R. Co. v. Ward, 2 Mich. 539; Moses v. Boston, etc., R. R. Co., 32 N. H. 523.

Where the goods come into the hands of a shipping agent of the vendee, who has no authority to dispose of them at his discretion, but only holds them to await further directions from the vendee as to the time and conveyance by which to ship them to such vendee at a place previously determined the vendee's control over the goods is not terminated. Harris v. Pratt, 17 N. Y. 249; Caheen v. Campbell, 30 Pa. St. 254; compare Parker v. McIvers, 1 Desaussure, 274.

The actual delivery to the vendee or his agent, which puts an end to the transitu or state of passage, may be at the vendee's own warehouse, or at a place which he uses as his own, though belonging to another, for the deposit of goods. Scott v. Pettit, 3 B. & B. 469; Rowe v. Pickford, 8 Taunt. 83; Frazer v. Hilliard, 2 Strob. 309.

At a place where he means the goods to remain, until a new destination is communicated to them by orders from himself. Dixon v. Baldwin, 5 East, 175; Rowe v. Pickford, 1 Moore, 526; Morley v. Hay, 3 M. & R. 696; Harris v. Pratt, 17 N. Y. 249; Biggs v. Barry, 2 Curtis, 259; Guilford v. Smith, 30 Vt. 49; Caheen v. Campbell, 30 Pa. St. 254; Rowley v. Bigelow, 12 Pick. 307.

By the vendee's taking possession at some point short of the original intended place of destination. James v. Griffin, 1 M. & W. 20, 2 M. & W. 633; Foster v. Frampton, 6 B. & C. 107; Mohr v. Boston, etc., R. R. Co., 106 Mass. 67; Durgy Cement Co. v. O'Brien, 123 Mass. 12; Jordan v. James, 5 Ohio, 89; Wood v. Yeatman, 15 B. Mon. 270.

In Leeds v. Wright, 3 B. & P. 320, the London agent of a Paris firm had in the packer's hands in London goods sent there by the vendor from Manchester, under the agent's orders; but it appeared that the goods were at the agent's discretion, to be sent where he pleased, and not for forwarding to Paris; and it was held that the transitu was ended.

In Scott v. Pettit, 3 B. & P. 469, the goods were sent to the house of the defendant, a packer, who received all of the buyer's goods, the buyer having no warehouse of his own; and there was no ulterior destination. *Held*, that the packer's warehouse was the buyer's warehouse, the packer having no agency except to hold the goods subject to the buyer's orders.

In Valpy v. Gibson, 4 C. B. 837, the goods were sent to a forwarding house in Liverpool by order of the buyer, to be forwarded to Valparaiso; but the Liverpool house had no authority to forward till receiving orders from the buyer. The buyer ordered the goods to be relanded after they had been put on board, and sent them back to the vendor, with orders to repack them into eight packages instead of four; and the vendors accepted the instructions, writing, "we are now repacking them in conformity with your wishes." *Held*, that the right of stoppage was lost; that the transitu was at an end; and that the redelivery to the vendor for a new purpose could give him no lien. See also Dodson v. Wentworth, 4 M. & G. 1080; Cooper v. Bill, 3 H. & C. 722; Smith v. Hudson, 6 B. & S. 431; Rowe v. Pickford, 8 Taunt. 83;

Sawyer v. Joslin, 20 Vt. 172; Covell v. Hitchcock, 23 Wend. 611; Biggs v. Barry, 2 Curtis, 259.

The question as to whether a warehouseman received goods as the agent of the vendor or the vendee, is a question of fact for the jury to decide. Hoover v. Tibbits, 13 Wis. 199.

The wrongful delivery of the goods to one not entitled to receive them will not preclude the right of stoppage in transitu. Kitchen v. Spear, 30 Vt. 545.

But if a third person who gives bona fide value obtains possession of the goods by a bill of lading which has come into the vendee's possession by the assent of the vendor, then the right of stoppage ceases. Kemp v. Canavan, 25 L. C. L. R. 216; Dows v. Greene, 24 N. Y. 638; Rawls v. Deshler, 4 Aff. Arg. Cas. 12; Newhall v. Central Pacific R. R. Co., 51 Cal. 345, 21 Am. Rep. 713; Sawyer v. Joslin, 20 Vt. 172; Kitchen v. Spear, 30 Vt. 545; Seymour v. Newton, 105 Mass. 275; Secomb v. Nutt, 14 B. Mon. 324; Winslow v. Norton, 29 Me. 421; Lee v. Kimball, 45 Me. 172; Pratt v. Parkman, 24 Pick. 42; Atkins v. Colby, 20 N. H. 154; Audenreid v. Randall, 3 Cliff, 99.

But if the agent has authority to give them a new destination from that originally intended the delivery is complete. Wood v. Yateman, 15 B. Mon. 270.

If the goods while in transitu are attached by a creditor of the vendee, the right of the vendor to stoppage in transitu will not be superseded. Dechman v. Williams, 50 Miss. 500; Morris v. Shryock, 50 Miss. 590; Seymour v. Newton, 105 Mass. 272; Durgy Cement Co. v. O'Brien, 123 Mass. 12; Buckley v. Furniss, 15 Wend. 137; Clark v. Lynch, 4 Daly, 88; Calahan v. Babcock, 21 Ohio St. 281; Newhall v. Vargas, 15 Me. 314; Hays v. Mouille, 14 Pa. St. 48; O'Brien v. Norris, 16 Md. 122.

The carrier's interest arises only where he is required to deliver possession of the goods to the vendor. If the vendor's claim be good and the carrier refuses or neglects to recognize it, he becomes liable. Litt v. Cowley, 7 Taunt. 169; Bohtlingk v. Inglis, 3 East, 381; Syeds v. Hay, 4 T. R. 260; Bierce v. Hotel Co., 31 Cal. 160; Jones v. Earl, 37 Cal. 630; O'Brien v. Norris, 16 Md. 122; Reynolds v. Boston, etc., R. R. Co., 43 N. H. 580.

The notice of the stoppage must be given to the person in possession of the goods, or if to his employer, then under such circumstances and at such time as to give the employer opportunity, by using reasonable diligence, to send the necessary orders to his servant. Whitehead v. Anderson, 9 M. & W. 518; Litt v. Cowley, 7 Taunt, 169; Ex parte Falk, 14 L. R., Ch. Div. 446; Bell v. Moss, 5 Whart. 189; Mottram v. Heyer, 5 Denio, 629; Ascher v. Grand Trunk Ry. Co., 36 U. C., Q. B. 609.

The notice may be given by the vendor himself, or by his agent. All that is required is some act or declaration of the vendor countermanding delivery. The usual mode is a simple notice to the carrier, stating the vendor's claim, describing the goods, and forbidding delivery to the vendee, or requiring that the goods be held subject to the vendor's orders. It is prudent for the carrier to retain possession of the goods until the validity of the asserted claim is established. Bohtlingk v. Inglis, 3 East, 381; Syeds v. Hay, 4 J. R. 260; Snee v. Prescot, 1 Atk. 250; Reynolds v. Boston, etc., R. R. Co. 591; Chandler v. Fulton, 10 Texas, 2; Bell v. Moss, 5 Whart. 189; Rucker v. Donovan, 13 Kan. 251; Newhall v. Vargas, 13 Me. 93; Mottram v. Heyer, 5 Denio, 629; Bierce v. Hotel Co., 31 Cal. 160; Jones v. Earl, 37 Cal. 630; Seymour v. Newton, 105 Mass. 272; Clementson v. Grand Trunk Ry. Co., 42 U. C., Q. B. 263; Ascher v. Grand Trunk Ry. Co., 36 U. C., Q. B. 609.

As to how the right may be defeated, delivery of the goods by the carrier, and bills of lading, see Wigton v. Bowley and note; 3 Am. & Eng. R. R. Cas. 388, 390.

As to where goods are shipped through connecting carriers, and bills of lading issued by the first carrier, see Sutherland v. Second National Bank, infra.

JEWELL

v.

CHICAGO, ST. P. AND M. RY. CO.

(*Advance Case, Wisconsin. April* 5, 1882.)

One who passed out of a railway car and got upon the platform thereof, and attempted to step or jump from the car while it was in motion, cannot recover for injuries suffered in consequence thereof, even though he had reached his place of destination, and the train, which had previously stopped to permit passengers to alight, had not so stopped for a reasonable length of time.

Upon the admitted facts, and those shown by undisputed evidence in this case, this court holds that the court below erred in not setting aside special findings of the jury to the effect that the plaintiff was not guilty of contributory negligence, and granting a new trial, though there was also a general verdict in plaintiff's favor.

APPEAL from circuit court, St. Croix county.

L. P. Wetherby, N. H. Clapp, and R. M. Bashford, for respondent. W. E. Carter and John C. Spooner, for appellant.

CASSODAY, J.—For the purposes of this appeal, we assume that there is evidence sufficient to justify the jury in finding that the train did not stop in the first instance for a sufficient length of time to enable the plaintiff, in the exercise of due diligence, to get off the train with safety; notwithstanding the undisputed occurrences during the stoppage, as detailed by the plaintiff's own witnesses, would seem to demonstrate that a sufficient time did elapse while the train was at rest to enable the plaintiff to get off. Does the undisputed evidence show that the plaintiff was guilty of contributory negligence? The undisputed evidence shows that the train started the first time just before the plaintiff passed out of the car in which she was riding onto the front platform of the same, and that she so passed out while the train was in motion.

It also appears, from evidence which amounts to a demonstration, and which is not disputed by any direct testimony, but merely by certain inferences to be drawn from some statements of the plaintiff, and perhaps one or two of the other witnesses, that when the train stopped the second time the door of the baggage car had not passed the east end of the depot platform, and that the conductor, Pemberthy, and his sister were there near where the plaintiff subsequently fell onto the depot platform, and while there the train started the second time. That this is so seems to be overwhelmingly demonstrated by all the facts and occurrences detailed

in the evidence. This being established, and the fact being evident of there being a smoking car between the baggage car and the ladies' car, it conclusively follows that, after the train started the second time, the plaintiff, on the front end of the ladies' car, moved eastward at least half the length of the baggage car and the length of the smoking car with the intervening spaces before she reached the place where she struck the depot platform. Even had there been no smoking car, as some seemed to think, yet, as the door of the baggage car was at the point named when the car started the second time, the plaintiff must thereafter have moved eastward upon the platform and steps of the ladies' car at least half the length of the baggage car and the intervening space between that and the next car before she reached the place where she struck the depot platform.

It is very certain, from Pemberthy's evidence, that when, after leaving the conductor and on his way to the west end of the depot, and when he saw the plaintiff standing on the front platform of the ladies' car, the train was moving after having started the second time. The plaintiff's theory is that after the conductor had stopped the train to get Pemberthy's trunk, and while it was standing still, and while she was in the act of passing from the steps at the front end of the ladies' car onto the depot platform, the train suddenly started, and that she was thereby thrown onto the depot platform by the jerk. Had this been so she would necessarily have fallen many feet west of where she actually did fall, for, at the very instant when the train so started the second time, and she claims she was so jerked off, the conductor and Pemberthy were on the east end of the depot platform, nearly opposite the door of the baggage car, and at or very near the very spot where all agree she subsequently landed upon the depot platform. Another difficulty with the plaintiff's theory is that had she been thrown from the steps of the car platform by the sudden starting of the train, and without any voluntary step or jump from the car onto the depot platform, as found by the jury, then she would necessarily have been thrown lengthwise of or by the side of the train, and not laterally onto the depot platform, as she was thrown. Can we say there is evidence, not in conflict with the admitted facts, tending to prove the plaintiff's theory, and sufficient to sustain a verdict to that effect?

The plaintiff concedes she was attempting to get from the car steps onto the depot platform at the instant she claims she was jerked off; so the fact of her being in the act of voluntarily stepping from the car onto the depot platform is confessed, notwithstanding the special finding of the jury to the contrary, the only dispute being whether such voluntary stepping took place while the train was at rest or in motion. The plaintiff testified, in effect, that the man who assisted her, and went out of the car ahead of her, told her not to attempt to get off the train while it was in

motion, but that no one else was present or said anything to her about it. The jury, on the contrary, found that the brakeman and by-standers warned her not to get off while the cars were in motion. She concedes, in effect, that she did attempt to go down the steps, and got onto the first step, and she don't know but she got onto the second step, and that the man who assisted her was below her on the step; that she was anxious to get off the car, but was not much excited until she had stepped down onto the first step, and the train started up, when she became afraid she would be thrown off and then tried to hold on, and became frightened. Jennie Wilson testified, in behalf of the plaintiff, in effect, that she was standing at the depot door at the time; that she did not see the plaintiff fall, because she supposed she would be killed, and so covered her eyes; that she saw the plaintiff "on the platform when the train started the second time;" that "the platform of the car on which she stood had not got by her when the train made the second stop, but was eight or ten feet west of her; that the train had stopped, or slackened up, before it passed her, but she did not know as it stopped perfectly still. If it did, it was just for an instant, but it slacked."

The facts stated by this witness, that the place where the plaintiff was when the train stopped or slackened was some distance west of where she stood at the depot door, while the place where she went onto the depot platform was shown conclusively to have been some feet east of where she stood, and hence her testimony in this regard is in direct conflict with the plaintiff's theory, and in harmony with the defendant's theory. The same may be said of the evidence of the plaintiff's daughter, who testified, in effect, that she was on the depot platform, on the east side of the depot door, when the train stopped; that the car was in motion when she saw her mother go past her, standing on the lower step of the platform. Of course but little reliance can be placed upon duration not measured by conduct, nor distance not measured by objects or measurements. A very careful reading and analysis of the testimony fails to disclose any evidence to sustain the fourth finding, that the plaintiff did not voluntarily step or jump from the cars onto the platform, except certain statements of the plaintiff and inferences which the admitted facts, and facts as established by undisputed evidence, clearly show could not possibly exist. The same may be said with reference to the third finding of the jury, to the effect that the plaintiff, while standing upon the steps of the car platform, was thrown therefrom by the sudden starting of the train. The same is true, at least in part, of the thirteenth finding above stated.

We must conclude from the admitted facts, and facts established by evidence and circumstances not disputed, and which are of such a character as to preclude the possibility of the correctness of any

contrary inference or statement, that the plaintiff not only went out of the car in which she was riding onto the platform of the same while the train was in motion, but that she also went onto the steps and from there stepped or jumped onto the depot platform while the train was in motion. The question, therefore, recurs whether such conduct on her part was contributory negligence?

In Railroad Co. *v.* Aspell, 23 Pa. St. 147, it was held that "a passenger who has been negligently carried beyond a station where he intended to stop, and where he had a right to be let off, may recover compensation for the inconvenience, loss of time, and labor of travelling back; but where the plaintiff, under such circumstances, jumped off the car when in motion, though warned not to do so, it was held that he could not recover for the injury sustained."

In Gavett *v.* Railway, 16 Gray, 501, it was held that "a passenger in a railroad car who, knowing that the train is in motion, goes out of the car and steps upon the platform of the station while the train is still in motion, is so wanting in ordinary care as not to be entitled to maintain an action against the railroad corporation for an injury therefrom."

In Hickey *v.* Ry. Co. 14 Allen, 429, it was held that "a traveller by railroad cannot maintain an action against a railroad company to recover damages for personal injury sustained by him in consequence of his voluntarily and unnecessarily standing upon the platform of a passenger car while the train is in motion. See also Nichols *v.* Ry. Co. 106 Mass. 463; Harvey *v.* Ry. Co. 116 Mass. 269; I. C. R. Co. *v.* Able, 59 Ill. 131; O. & M. R. Co. *v.* Schiebe, 44 Ill. 460; Burrows *v.* Ry. Co. 63 N. Y. 556; Morrison *v.* Ry. Co. 56 N. Y. 302; J. R. Co. *v.* Swift, 26 Ind. 459; Canada R. Co. *v.* Randolph, 53 Ill. 510; I. C. R. Co. *v.* Slattan, 54 Ill. 133; O. & M. Ry. Co. *v.* Stratton, 78 Ill. 88; C. & N. W. R. Co. *v.* Seates, 90 Ill. 586.

In Secor *v.* Ry. Co. 10 Fed. Rep. 15, a passenger on a train that had approached a station and was still moving slowly, stood on the lower step of a car, in the act of stepping to the platform of the station, when, in consequence of the car being moved forward with a jerk, he was thrown upon the platform and injured, and Drummond, C. J., "held that he was guilty of contributory negligence in attempting to alight from the train while it was in motion." Bon *v.* Railway, 10 N. W. Rep. (Iowa) 225; L. S. & M. S. Ry. *v.* Bangs, 3 Am. & Eng. R. R. Cas. 426.

The cases cited are clearly in harmony with Davis *v.* Railway, 18 Wis. 175. In the light of these authorities we must hold that, even assuming that the train did not stop in the first instance a sufficient length of time to enable the plaintiff in the exercise of due diligence to get off the car in safety, yet as she passed out of the car and went down onto the steps of the car platform, and from thence stepped or jumped onto the depot platform, while the

train was in motion, contrary to the warning of the brakeman and by-standers who were present, she must be deemed guilty of negligence which materially contributed to the injury complained of, and hence the seventh and ninth findings of the jury are not supported by the evidence.

We are not certain but we would be justified in reversing the judgment by reason of irregularities in the submission of the case to the jury. The eighth question submitted was: "Were the defendant's agents guilty of negligence, either in not stopping long enough to allow the plaintiff to alight from the train, or in suddenly starting the train after the plaintiff came upon the platform, on her way from the car to the depot platform?" To this the jury answered "yes." Whether the answer is to the first part or to the last part, it is impossible to tell. If the answer is to the first part of the question, then does it refer to stopping of the train in the first instance, as involved in the first question submitted, or to the second stopping of the train? If to the first stop, then it was already covered; if to the second, then it was immaterial, as it was conceded that that stop was but for an instant. If, on the contrary, the answer does not apply to the first part of the question, but to the last part, then it makes the negligence to consist wholly "in suddenly starting the train after the plaintiff came upon the platform on her way from the car to the depot platform," whereas that act of itself does not necessarily involve any want of care on the part of the defendant, and yet the ninth and tenth questions each assume that it did involve a want of care; besides, the jury had already found, in answer to the third question submitted, that the train suddenly started while the plaintiff was standing upon the steps of the car platform.

Again, the propriety of submitting the twelfth question to the jury may be doubtful, since it is not very manifest that it involves any material issue. Again, the general verdict seems to be in conflict with some of the special findings—notably the sixth. In submitting special verdicts to a jury each question submitted should be limited to a single, direct, and material controverted issue of fact, and in such a way that the answer will necessarily be positive, direct, and intelligible. Eberhardt *v.* Sanger, 51 Wis. 72, and cases there cited. But we do not base our decision upon the irregularities in the verdict, as they were not discussed on the argument, and may have been committed at the instance of the defendant's counsel. Whether a general verdict can serve to sustain a judgment where there is a special verdict purporting to cover all the material and controverted issues of fact in the case, but some of which are conflicting or contrary to the evidence, quære.

The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

See note, 3 Am. & Eng. R. R. Cas. 431.

STRAUS

v.

KANSAS CITY, ETC., R. R. CO.

(*Advance Case, Missouri. March*, 1881.)

Where the railroad does not halt its train at a station a sufficient length of time to enable a passenger, by the use of reasonable diligence, to get off before it is started again, and it is so started while the passenger is in the act of alighting, whereby he is thrown down and injured, the company is liable.

Where insufficient time is allowed a passenger for safe and convenient egress from the cars, and before he attempts to alight the train is started, and he then jumps from the train while its motion is so slight as to be almost imperceptible, and is injured, it is for the jury to determine, from the age and physical condition of the passenger, whether he is guilty of contributory negligence.

If the train is stopped a sufficient length of time for the passenger to conveniently alight, and without any fault of defendant's servants he fails to do so, and the conductor, not knowing and having no reason to suspect that the passenger was in the act of alighting, caused the train to start while he was so alighting, then the company is not liable for the resulting injury.

Where the conductor, after allowing a sufficient length of time for passengers to alight, starts the train before the passenger is in the act of getting off, and is therefore guilty of no negligence, and after the train is in motion the passenger who has been dilatory jumps from the train and is injured, he cannot recover.

APPEAL from Buchanan Circuit Court.

HOUGH, J., delivered the opinion of the court:

In this action the plaintiff claimed damages in the sum of $5,000 for injuries received by him in attempting to alight at a way station on the defendant's road from a train of the defendant, in which he was a passenger. The petition alleges, in substance, that immediately upon the stopping of said train at Pickering Station, which was plaintiff's destination, the plaintiff, with all convenient haste, but in the exercise of due care, attempted to leave the train, and while in the act of stepping from the train upon the platform at the depot, and before he had sufficient time to get upon said platform said train was negligently and recklessly started on its way by the servants in charge thereof, whereby plaintiff was thrown down between said platform and the moving train, and was tightly and violently compressed between the same, and thereby severely bruised and injured.

The answer of the defendant denied all negligence on the part of its servants, and averred that the injuries complained of resulted from plaintiff's own negligence. The testimony of several witnesses for the plaintiff tended to support the allegations of the

petition. The plaintiff himself testified as follows: "On the 26th of November, 1877, I was a passenger on defendant's train going to Pickering. Had bought a ticket from St. Joseph to Pickering. Just as the train whistled for Pickering I got up from my seat and went to the door of the car. When it stopped I opened the door and started out; car started just as I was in the act of getting off with a sudden jerk, and I was thrown down between the car and the platform, and rolled around till I got to the end of the platform. I suffered a great deal for two or three weeks, and might say agony; laid on my back for six weeks. My back is injured to the present day. I was unable to do any work until after the first of January, 1878. Changes in the weather affect me more or less. I feel them, and am not as strong as I used to be; my back is weak; I can't lift as I used to be able to." Several witnesses testified that the plaintiff told them a short time after the accident that he had been traveling on trains so much that he had become careless; that he did notice the train was moving, and got off backwards, and that nobody was to blame for his getting hurt but himself. Other witnesses testified that the defendant told them that the conductor was not to blame.

The plaintiff, on his cross-examination, admitted that he stated to several persons that the conductor was not to blame, but said he so stated because he did not wish to get the conductor into trouble, but he denied that he ever stated to any one that no one was to blame but himself. The conductor testified as follows: "The train stopped still; the stop was for at least one half minute. We stopped the usual length of time for stops at stations at which no business is to be transacted. After the train stopped, I walked out on to the depot platform, walked across to the corner of the depot, and leaned up against the building for a few seconds. . . . As I went across the platform to the depot I looked to the left over my shoulder toward the rear of the train, and saw the plaintiff coming down the steps of the car. I leaned against the depot a few seconds, and then gave the signal to the engineer to go ahead, and walked across to the platform to the door of the baggage car and went in. I went into the same door I came out of; went back into the same car. The car had not started when I went into it." The station agent at Pickering testified in substance that after the train stopped he walked from his office across the platform to the train, got his mail from the train, and returned to the office door before the train started. He saw the plaintiff standing on the car platform looking through the door into the car, and saw him after the train started step off the car with the wrong foot, which whirled him round and off his feet.

At the request of the plaintiff, the court gave the following instructions: 1. The court instructs the jury if they believe from the evidence that the plaintiff was, at the time stated in his peti-

tion, a passenger on defendant's train with a ticket from St. Joseph to Pickering; that said train did not stop long enough at Pickering to give the plaintiff reasonable time to pass from his seat in the car to the station platform, and that plaintiff, by reason of the starting of the train while he (plaintiff) was in the act of stepping from the car was thrown down between it and the station platform, and injured without negligence on his part, they will find for plaintiff, and assess his damages at such sum not exceeding $5,000, as they may deem a reasonable compensation for the injuries sustained by him. 3. That if the jury believe from the evidence that the conductor of the train saw plaintiff standing on the car platform and knew that he wished to stop at Pickering, but without noticing or waiting to see whether he had got off or not gave a signal for starting the train, and the train was started while the plaintiff was in the act of stepping off, by reason of which starting plaintiff was thrown down and injured, they will find for the plaintiff. 7. That if the jury find for the plaintiff, they will, in estimating the damages, take into consideration the age and situation of plaintiff, his bodily and mental anguish resulting from the injury received, the actual expenses to which he has been subjected by reason thereof, the loss from not being able to work, and the extent to which his ability to earn a livelihood has been impaired by the injuries received. 8. The jury are the judges of the credibility of the witnesses, and the weight to which the testimony of each is entitled. 9. That although the plaintiff may have failed to exercise ordinary care and prudence, which failure may have contributed to the injury complained of, yet, if the agent and employees of the defendant were guilty of negligence or carelessness in starting the train, which was the direct cause of the injury, and might, by the exercise of ordinary care and prudence have prevented the injury, the defendant is liable.

The following instructions were given at the request of the defendant: 1. The plaintiff cannot recover unless the evidence shows a case of negligence on the part of the defendant; and if the jury believe from the evidence that both parties by their negligence immediately contributed to produce the injury, the plaintiff cannot recover, and their verdict should be for defendant. 2. The burden of proof to establish the negligence of defendant, or of its employees, is upon the plaintiff, and unless said negligence is established by a preponderance of the evidence to the satisfaction of the jury, they will find for the defendant. 3. If the jury believe from the evidence that the negligence of plaintiff contributed directly to his injury in whole or in part, they will find for defendant, although they may believe from the evidence that defendant and its employees were also guilty of negligence.

The court of its own motion gave the following: 1. The court instructs the jury that such statements of the plaintiff as the jury

may believe from the evidence were made to witnesses are evidence against him of the truth of the facts so stated.

The only instructions asked by the defendant and refused by the court, which it will be necessary to notice, are the following: 5. If the jury believe from the evidence that the train in proof, at the time of the accident, stopped long enough to enable plaintiff, with reasonable care, to get off of said train safely, then the jury will find for the defendant. 7. If the jury believe from the evidence that the plaintiff opened the door of the car to get off at the station just as the cars stopped at the station, and that instead of getting off at once he stopped and looked back into the car, or to talk to some person, and didn't attempt to get off until the cars started again, and was then thrown down and injured in so attempting to get off, they will find for defendant.

The plaintiff recovered judgment for $500, and the defendant has appealed.

If the servants of the defendant did not halt the train at Pickering Station a sufficient length of time to enable the plaintiff, by the use of reasonable expedition, to get off before it was again started, and it was so started while plaintiff was in the act of alighting, whereby he was thrown down and injured, the defendant is undoubtedly liable. Hutchinson on Carriers, p. 612. Or, if an insufficient period of time was allowed the plaintiff for safe and convenient egress from the cars, but before he attempted to alight the train was started and he then jumped from the train while its motion was still so slight as to be almost imperceptible, and was injured, it was for the jury to determine, from the age and physical condition of the plaintiff and the attendant circumstances, whether such act constituted negligence. Doss *v.* Missouri, etc., R. R. Co., 59 Mo. 27; Nelson *v.* Atlantic, etc., R. R. Co., 68 Mo. 593.

In such case the negligence of the company's servants in prematurely starting the train, will support a recovery, if the act of the passenger in jumping from the train should not be found by this jury to amount to concurring negligence.

If this train was stopped a sufficient length of time for plaintiff to conveniently alight, and, without any fault of the defendant's servants, he failed to do so, and the conductor not knowing, and having no reason to suspect, that plaintiff was in the act of alighting, caused the train to start while he was so alighting, then the defendant would not be liable.

We do not conceive it to be the duty of the conductor in all cases, after allowing sufficient time for passengers to get off, regard being had to their age, sex, physical condition and surroundings, to pass along the train and examine the platform of each coach, to see whether there are any persons attempting to get off before starting his train, but if he has reason to believe that any passenger

who has reached his destination has not alighted, and, though dilatory, may be in the act of alighting, and he starts his train without examination or inquiry, and such passenger is in the act of alighting when the train is started, and is thereby injured, then the company will be liable. But where the conductor, after allowing a sufficient time for passengers to alight, starts the train before the passenger is in the act of getting off, and is, therefore, guilty of no negligence, and after the train is in motion, the passenger who has been dilatory jumps from the train and is injured, he cannot recover. Applying these rules to the case at bar, it will be seen that the third instruction given for the plaintiff improperly ignores the question whether the train was stopped a reasonable length of time to enable the plaintiff to get off.

The ninth instruction given for the plaintiff is in conflict with the third given for the defendant, and does not conform to the views herein expressed, and to what may now be regarded as the settled law of this State, that when the concurring negligence of plaintiff proximately contributes to produce the injury complained of, there can be no recovery unless such injury is also the direct result of the omission of the defendant after becoming aware of the danger to which the plaintiff was exposed, to use a proper degree of care to avoid injuring him. Nelson *v.* Atlantic, etc., R. R. Co., 68 Mo. 593.

The fifth instruction asked by the defendant was properly refused by the court. Its phraseology is such as to exempt the defendant from liability, although guilty of negligence proximately contributing to produce the injury, after becoming aware of the concurring negligence of plaintiff.

The seventh instruction asked by the defendant was also properly refused, for the reason that it is not, as it should be, predicated upon the hypothesis that the train was stopped a reasonable length of time to enable the plaintiff to get off.

The judgment will be reversed and the cause remanded.

All concur.

See note, 3 Am. and Eng. R. R. Cas. 481.

BRYANT

v.

SOUTHWESTERN R. R. Co.

(Advance Case. Georgia, March 7, 1883.)

Where the shippers of live-stock over a railroad entered into an agreement with the railroad company, whereby it was stipulated and agreed that the carrier should not be responsible for injury to the stock in consequence of a failure or neglect to water or feed them while in transit, and the carrier neg-

ligently carried them beyond the destination to which they were shipped, in consequence of which they were deprived of the attentions of the shippers and their agents, and were without food or water during two days, *held*, the carrier was liable for damages occasioned to the stock thereby.

CRAWFORD, J., delivered the opinion of the court:

Bryant and Sockett sued the Southwestern R. R. Co. to recover damages for losses sustained upon a car load of mules shipped from Atlanta to them at Americus. The allegations upon which they relied for a recovery were: That the mules were delivered and received in good order by said railroad company at Macon, to be delivered in like good order to Sockett at Americus, on the 22d day of January, 1881; but by the careless and negligent conduct of its agents and employees, said car load of mules was sent to Dawson, forty miles beyond Americus, and there kept for three or four days without attention, to their injury $500. The jury returned a verdict for the defendant, which plaintiff moved to set aside, but the motion was overruled, and they excepted.

The evidence material to a decision of the questions made by this bill of exceptions is, that the mules belonging to the plaintiffs were shipped in a car "billed" to Dawson, and consigned to one Thornton, whilst Thornton's mules were consigned to the plaintiffs at Americus. Thus the plaintiff's mules were carried beyond their destination, were shipped to Dawson, and remained in the car from the time on Sunday, when they should have been unloaded, until Tuesday at twelve o'clock, without attention, water or food. They were so damaged by the confinement and inattention that some of them were almost wholly lost, and the rest were injured $20 a head. Other proof of losses were also introduced.

The defendant introduced in evidence a "live-stock contract," by which it was agreed that the shipper should release the railroad company from liability from all injury, loss or damage, from the character of the freight, and from all other damages which shall not have been caused by the fraud or gross negligence of the company. Other stipulations were incorporated, but nothing material to be added which affects the rights of the parties after the mules were carried beyond the place of delivery.

It further appears that the mules were taken out of the car at Macon *en route*, watered and fed, and then reloaded, and received by the defendant. No evidence was submitted controverting the facts that they were carried to Dawson; that they were without water, food or change from the time they were received on Sunday at Macon until delivered at Americus on Tuesday at twelve o'clock, or that the losses set up were not true.

The judge charged the jury as follows: "In the contract between plaintiff and the Central R. R. Co., it is especially stipulated that they, nor the road receiving that property from them, shall not be liable for any attention, feeding, or watering the stock, but that

they should offer reasonable facilities to the shipper or person in charge of the stock. The railroad company merely undertook to offer, or afford, them facilities for feeding and watering the stock, not to feed and water them itself. It was stipulated that the shipper should not hold the railroad company responsible for any delay occurring in the delivery of the property, but that the shipper should attend to the stock, and feed them and water them. Therefore the Southwestern R. R. Co. is not liable for any injury that occurred to those mules for want of being fed and watered, for people are bound by their contracts, by the contracts which they may make."

"If you should believe from the evidence that Sockett's car load of mules was, by mistake of a person in Atlanta, connected with the Central R. R. Co., shipped to a person in Dawson, and not to Sockett in Americus, and that the Southwestern R. R. Co. received these mules in Macon so consigned to a person in Dawson, and carried them to Dawson, and that, whatever damage they sustained occurred at that point by reason of their being shipped to that point, and not being fed and watered there, why, then, in my judgment, the Southwestern R. R. Co. is not liable for such damages."

The first paragraph of the foregoing charge would be correct if the railroad company had carried out its contract by a delivery of the mules at Americus, as it agreed to do, and had not shipped them beyond. The plaintiff's contract extended to the attention, feeding and watering the mules only to the place of their destination; and had the delay occurred, and the damage been sustained before reaching it, just as it did afterwards, then the plaintiffs could not have recovered. He had the right to expect, according to his contract, that his mules would be delivered at the place of their consignment, and, therefore, was not bound to follow them to Dawson, and feed, and water, and care for them there.

The judge truly stated the law in instructing the jury that people were bound by their contracts, and on construction of this contract that the Central R. R. and its connecting lines were to transport this live stock to Americus and no further; if they did, and damage accrued to the owner thereby, they were liable to respond.

The objection to the second paragraph of the foregoing charge is, that it relieved and discharged the Southwestern R. R. Co. from liability on the contract agreed upon by the Central R. R. for itself and the Southwestern to transport and deliver to the owners at Americus this car load of mules, and which it undertook to execute but failed to perform; and, although a mistake at Atlanta may have been made by an agent of the Central R. R. in shipping these mules improperly, yet such mistake would not relieve the defendant from liability under the facts as shown by the record in this case. It was a party to the contract. When, therefore, it broke its contract by passing Americus and carrying to Dawson the plaintiffs' mules,

they were entitled to recover for such breach of the contract, and for all damages consequent thereon, whether the same resulted from the failure to feed or water the mules, or to make sale of them, or any other cause flowing directly therefrom.

Another assignment of error arises on the failure of the judge to charge: "That if the defendant had the mules in its possession, and while in its possession they were injured by the gross negligence of the agents and employees of said company in not feeding and watering them, then the defendant would be liable to the owners for such damage."

The plaintiffs were not entitled to this charge, as the gross negligence was confined to the watering and feeding generally, and not to the time whilst they were beyond Americus. Plaintiffs themselves were required to give this attention to Americus; but when they were shipped beyond that point, they had not undertaken to follow them wheresoever the company might carry them and continue such attention. If, then, after thus breaking the contract, they were damaged by such neglect, the defendant would be liable, and the plaintiffs were entitled to such charge so limited, but not so general as claimed.

Judgment reversed.

THE LAKE SHORE AND MICHIGAN SOUTHERN R. R. Co.

v.

BENNETT.

(*Advance Case, Indiana. June* 22, 1882).

Where a person ships cattle over a railway under a special contract of carriage, he cannot elect to charge the railroad company with the liabilities of a common carrier.

A railroad company is not liable for delay in receiving and carrying goods or in transporting them after they have been received whenever the delay is necessarily caused by unforeseen disaster which human prudence cannot provide against, as by an uncontrollable mob.

The fact that a railroad company has reduced the wages of its employees cannot be held to justify or excuse a mob composed of indiscriminate persons in stopping trains and delaying the transportation of goods, nor can the company be held responsible for the consequences of such unlawful proceedings when they cause such delay.

Pittsburg, etc., R. R. Co. *v.* Hollowell, 65 Ind. 188, approved and followed.

HOWK, J.—In this action, the appellee sued the appellant, in a complaint of two paragraphs.

In the first paragraph the appellee sought to recover damages of

the appellant for an alleged breach of its common law duty, as a common carrier for hire, in the transportation of freight. It is very clear, however, that the special findings and judgment below in this case were it not founded upon the first paragraph of the complaint, and, therefore, it need not be further noticed. In the second paragraph of his complaint the appellee alleged in substance that the appellant, before and at the time of committing the grievances thereinafter mentioned, was a common carrier of cattle and other live stock, for a certain price or reward paid to the appellant, and that, on July 21, 1877, at Kendallville station, in Noble county, Indiana, he delivered to appellant, and the appellant then and there received from him, one car-load of cattle, to wit, 16 head of cattle, of the value of $1,600.00, to be carried and conveyed upon appellant's railroad in a car from said Kendallville station to East Buffalo station, on said road, in the State of New York, without default, negligence or unreasonable delay, on the appellant's part, and to be delivered at East Buffalo station, without any unreasonable delay, by appellant to appellee; that the distance from Kendallville station to East Buffalo station was 388 miles; that by reason of the great distance and the nature of said property, it was necessary that a person should accompany said cattle, for the purpose of caring for and attending to them during their transit; that, for the purpose of so caring for and attending to said cattle, it was agreed by and between appellee and appellant, that the appellee, without extra charge, should be carried by appellant without delay, in the train of cars in which said cattle were to be transported from Kendallville to East Buffalo, and that appellee should care for and attend to said cattle, while being so transported; and to that end and purpose, the appellant executed, as did also the appellee, a written contract, a copy of which was therewith filed, whereby the appellant agreed that the appellee should have the care and control of said cattle, while on the appellant's grounds or in transit, and should direct and control the handling and loading and unloading of said cattle.

And the appellee averred that, in pursuance of said agreement, he entered upon said train of cars for the purpose of caring for and attending to said cattle, and was ready and willing so to do; but the appellant, not regarding its duty in that behalf, so negligently and improperly conducted itself in and about the carriage and conveyance of the appellee and his said cattle, that he and his cattle did not arrive, without unreasonable delay, at East Ruffalo station; that appellant, in violation of its said agreement, while said cattle were in transit and before they had arrived at the place of delivery, at a station called Collingwood, in the State of Ohio, without any fault of the appellee and without his consent, refused to permit him to have further care and control of said cattle, and, by its agents, servants and employees, then and there assumed the

sole and exclusive care and control of said cattle, for the space of eleven days, and then and there by its agents, servants, and employees, carelessly, negligently, and recklessly, without sufficient and safe reasons for so doing, unloaded said cattle from the cars, in which they were being carried, and, by reason thereof, said cattle were bruised, lamed, strained, and otherwise injured; that the appellant, by its servants and employees, then drove said cattle, with other and strange cattle, on foot a distance of twenty miles over a dusty road, and during intensely hot weather, to another station on said railroad, known as the Painsville station, and there confined appellee's cattle, with 75 head of other and strange cattle in a cattle-pen which was not large enough to properly contain more than thirty-two head of cattle, and still refusing to permit appellee to feed, water, care for and attend to his said cattle, kept them in such overcrowded condition without any shelter from the heat of the sun and protection from the weather in said cattle-pen with said other cattle, for the space of eleven days; that while being so driven, and while confined in said pen, said cattle were maimed, bruised and wounded by the other strange cattle and by each other, and were heated and worried, by reason of all which and by said delay, the said cattle, through the neglect and carelessness of appellant's agents, servants, and employees, became sick, sore, unsalable and greatly depreciated in condition, weight, and value; and by reason thereof, and by a fall of three cents per pound in price of cattle at said place of delivery, between the day when, by due diligence, said cattle ought to have been delivered, and the day of their actual delivery the said cattle were worth $490.00 less than they would have been if they had been properly handled, cared for and attended to, and been delivered at East Buffalo station without unreasonable delay.

And the appellee further said that, during the time his cattle were so delayed, at appellant's request he remained at Painsville, until the appellant again loaded the cattle upon the cars, and commenced again to carry them to East Buffalo station, to wit, for eleven days; that, during that time, he expended the sum of $25.00 for his board and lodging, and his time was reasonably worth the sum of $25.00; that he also paid, for feed and other expenses of his cattle, the sum of $75.00; and that he had been damaged in the premises in the sum of $490.00; wherefore, etc.

The cause was put at issue and tried by the court, and at the appellant's request, the court made a special finding of the facts, and of its conclusions of law thereon.

The appellant excepted to the court's conclusions of law, upon the facts specially found, and filed its bill of exceptions. Its motion for a new trial having been overruled, and its exceptions saved to this ruling, the court rendered judgment for the appellee for his damages assessed, and costs.

In this court the appellant has assigned the following errors:

1st. The circuit court erred in each of its conclusions of law, upon the facts specially found;

2d. The court erred in overruling appellant's demurrer to the second reply to its answer; and

3d. The court erred in overruling appellant's motion for a new trial.

The court's special finding of facts is very long; but it is necessary, we think, to the proper presentation of the questions to be decided, that we should give a summary, at least, of the facts specially found, and this we will do accordingly, as follows:

1. The court found that, on and before July 2d, 1877, the appellant owned and operated a railroad, known as the Lake Shore and Michigan Southern Railway, extending from the city of Chicago, Illinois, to East Buffalo, New York, and passing through Kendallville, Indiana, and Collingwood, a station six miles east of the city of Cleveland, Ohio; that on and before the day named, appellant had been engaged in transporting on its railroad, cattle and other live stock for reward, and possessed all proper facilities for and solicited such employment.

2. On July 21st, 1877, appellee delivered to appellant, at Kendallville, 16 steers of the value of $1,200.00 to be transported from that place over said railroad to East Buffalo; which steers were delivered to and received by the appellant under a special contract, executed by the parties at the time, of which the following is a copy:

"LAKE SHORE AND MICHIGAN SOUTHERN RY. CO. STOCK CONTRACT.

"KENDALLVILLE STATION, July 21st, 1877.

"Memorandum of agreement made and concluded this day above named, by and between the Lake Shore and Michigan Southern Ry. Co., of the first part, by their station agent at the above named station, and A. B. Bennett, of Kendallville, of the second part, Witnesseth: That, whereas said railway company does not and will not assume or consent, as a common carrier, to transport live stock, nor will it carry the same, except on the condition that the owner of the property will take care of the same while in transit, and will give careful attention to its handling; now, therefore, in consideration that said railway company will transport, for the said party of the second part, one car load of live stock, at the special rate of forty-eight dollars per car load, the said party of the second part does hereby agree to take care of and look after said stock while in the cars or on the grounds of the company, or in transit, and hereby does assume all and every risk of injury which the animals or either of them may receive in consequence of any of them being wild,

vicious, unruly, weak, escaping, maiming, or killing themselves or each other, or from delays, or in consequence of heat, suffocation, or the ill effects of being crowded upon the cars of said railway company, or on account of being injured by the burning of hay, straw, or any other materials used by the owner for feeding the stock or otherwise, and for any damage occasioned thereby; and also all risks of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in or incident to, or from or in, the loading or unloading said stock.

"It being understood that, previous to loading, the owners agree to examine for themselves the cars, and in order to guard against accidents that may happen in consequence of insecurity (if any there may be) in the floor, frame or doors of the cars, the owners of the stock undertake to point out to the agent of the company any perceptible defect in such cars, to be repaired.

"And it is further agreed, that the said party of the second part is to load and unload said stock at his own risk, the said railway company furnishing the necessary laborers to assist, under the direction and control of said party of the second part, who will examine for himself all the means used in the loading and unloading, to see that they are of sufficient strength, of the right kind, and in good repair and order.

"And it is further agreed between the parties hereto, that each and every one of the persons riding free to take care and charge of said stock, do so at their own risk of personal injury from whatever cause; and that said party of the second part, for the consideration aforesaid, hereby release and agree to hold harmless, and keep indemnified, the said party of the first part of and from all damages, actions, claims, and suits on account of any and every the injuries, loss and damages herein before referred to, if any such occur or happen.

"This company will not be responsible for any loss or damage to the property, after the same shall have been delivered to any connecting railroad or other carrier, on the route to the point to which it is consigned; and all liability for any cause shall cease, when said property shall be so delivered to a connecting line. And it is expressly agreed that the railway company shall not, under any circumstances nor from any cause, be held liable beyond the sum of $200, for injury to or loss of any single animal, carried pursuant to this agreement, although its actual value may exceed that amount, unless its valuation and special accommodations for it, at a distinct rate, shall be stipulated in this agreement.

"And this agreement further witnesseth, that the said party of the second part has this day delivered to said company one car load of cattle to be transported to East Buffalo, on the conditions, stipulations, and the understandings above expressed."

This contract was executed by the appellant's station agent, at

Kendallville, and by said A. B. Bennett, and was dated July 21, 1877.

3. The usual running time, in the transportation of cattle by appellant, from Kendallville to East Buffalo, was thirty-three hours.

On the evening of July 21, 1877, the appellee's cattle accompanied by him, for the purpose of caring for them, were started in appellant's train of cars for East Buffalo station, and were carried with reasonable diligence and care until they arrived about two o'clock, P.M., of July 22, 1877, at Collingwood station, about six miles east of Cleveland, Ohio, on the Erie Division of said railroad.

The train of cars, upon which appellee's cattle were being carried, stopped as usual at Collingwood, for the purpose of changing engines, and train hands; but the train did not leave there, as it ordinarily did, and proceed on its way to East Buffalo.

The train remained on the track where it stopped, at Collingwood, until four o'clock, P.M., of the next day, and appellee's cattle were without food and water. In the mean time, there arrived at Collingwood many trains of cars, loaded with cattle, sheep and hogs, of which 160 cars were loaded with cattle, all going eastward on appellant's railroad.

For reasons hereafter stated, the appellant in the evening of July 23, 1877, the appellee's cattle and all the other cattle, sheep, and hogs, then on appellant's cars at Collingwood, were unloaded by appellant from the cars as they stood on the track of its road, by jumping the cattle out of the cars to the ground, a distance of about four feet, thereby injuring them.

After appellee's cattle and the other cattle were so unloaded, they were driven to Painsville, a station about 20 miles east of Collingwood on appellant's railroad, where there were cattle yards, in which they could be herded, watered and fed, there being no cattle yards at Collingwood. The cattle had been without water for about 30 hours and were very thirsty, and in passing streams of water, between Collingwood and Painsville, they drank to excess and were thereby injured. On July 24, 1877, the cattle arrived at Painsville, and were placed by appellant in the cattle yards, and fed and watered.

Appellee's cattle were placed with 75 head of strange cattle in a cattle yard, much too small for so many cattle, and appellant placed locks on the gates and fastened the cattle in, and they were there confined for eleven days, without shelter and exposed to the heat of the sun.

Appellee's cattle were of the Durham breed, and very docile and tame, and, by reason of the crowded condition of the yard, they were hooked, gored, and jaded by the other cattle, and were greatly depreciated in weight and value.

In about eleven days after their arrival at Collingwood, appellee's cattle were again placed on appellant's cars at Painsville and transported to East Buffalo, the place of their original destination.

4. When appellee's cattle arrived at Collingwood, on July 22, 1877, appellant was willing to carry the cattle in said car, eastward to East Buffalo, and had the proper cars and engines to perform its contract, but it was prevented from proceeding and completing, in the usual time, the carriage of the cattle to their place of destination. A few weeks prior to the arrival of said cattle at Collingwood, appellant had made an order reducing the wages of its employees on its trains, at its stations and shops, ten per cent; and nearly all the brakemen and firemen, in its employ, refused to perform their work, or to permit others to perform their work, on appellant's trains, or to move its trains as it wished to do.

Nearly all the appellant's firemen and brakemen, who had not been discharged by appellant, with other lawless persons, took forcible possession of all the engines and their fixtures, and the round house and placed the engines therein and barricaded the same, detached all the hose of the engines, uncoupled the cars and hid the coupling pins, and with great force, took full and complete possession of all the appellant's property at Collingwood station. The persons, who took such forcible possession of the appellant's property, boldly and defiantly refused to obey all orders of appellant's officers, and refused to permit any of its trains to be moved by any persons whatever, and openly threatened the lives of any persons who should attempt to move said trains, or obey the appellant's officers in relation to the movement of its trains or cars, unless the wages of the employees should be restored as they were before their reduction. Appellant's officers made several attempts to move its trains from Collingwood, and placed thereon employees who were faithful to appellant; but they were prevented by personal violence from moving said trains, and, to save their lives, they were compelled to desist from all efforts to move the appellant's trains.

The resistance to the commands of appellant's officers, in the movement of its trains, was composed of a lawless assembly of persons and assumed the character of a mob, of a very alarming appearance and dangerous for appellant to oppose, and could not be opposed and overcome without strong military power.

The threatened violence was so great, that appellant was powerless to resist or overcome it, and the authorities of the State of Ohio failed and, for a considerable time, were unable to suppress it.

The forcible resistance to the movements of appellant's train commenced, and the lawless assemblage of persons met, at almost the time of arrival of the train with appellee's cattle at Collingwood, on July 22, 1877, and continued for eleven days, and until said cattle were reshipped at Painsville, as before stated. During all the time, from the day the cattle arrived at Collingwood, until they were reshipped at Painsville, the appellant's officers exerted themselves to move said trains, and did all that could be done to induce the persons, who had been in appellant's employ, to desist from

their unlawful and riotous conduct, and permit appellant to use and control its own property, but they refused so to do, except on condition that the order for the reduction of their wages should be annulled, and their wages restored to the former rate. If appellant had rescinded its order reducing wages ten per cent, and restored the wages as they were before the reduction, the court found that its employees would have resumed their work, and have ceased all force and violence to its officers and faithful servants, and have restored to appellant the possession and control of its property and railroad; but it refused so to do, and the resistance continued during all said time.

On account of such forcible resistance and the unlawful seizure of its engines and property, appellant was prevented from moving its trains and proceeding with appellee's cattle.

5. Appellant had a round house at Collingwood where it kept many locomotives and usually changed the engines used in moving its freight trains; but it did not unload, feed, or water cattle there, and had no facilities for so doing.

6. Strikes and riots were occurring about the same time on other railroads in the United States, and had resulted at some places in the destruction of much railroad and other property; and the general belief was that all the persons who took forcible possession of railroad property in defiance of lawful authority were acting under and controlled by the orders of a secret body, enforced by violence and regardless of the laws of the land.

7. Appellant's officers during said time had cause to fear and did fear a great destruction of property by the persons who had so forcibly and unlawfully taken possession of appellant's railroad and other property; and they acted continuously and prudently with the rioters, so as not to provoke the destruction of property.

8. Appellant's officers were unable to move their trains eastward and carry appellee's cattle to East Buffalo, or to any other place where they could be cared for, fed, and watered, on account of such violence, although they had a sufficient number of employees who were ready and willing to move the train, with appellee's cattle, to East Buffalo, but were prevented on account of such violence from so doing. The appellant's officers took exclusive control of the cattle in unloading them, and kept such control until they were reloaded on the cars at Painsville.

The best that could be done to preserve the cattle was to drive them to Painsville, where they could be fed and watered; and on account of the large number of cattle so stopped and delayed at Collingwood, it was impracticable for the several owners thereof to unload and drive them separately to Painsville. Considering the great number of cattle on the cars at Collingwood, and their suffering condition, and the urgent necessity for prompt action to save them from perishing, it was necessary and proper that the cattle

should be handled as they were by appellant, and driven to Painsville, and, as they were thirsty, their drinking to excess and the consequent injury could not be avoided.

9. Said mob would have been disbanded, and all violent opposition would have ceased, if appellant had consented to restore the reduction of wages, and to retain the striking employees in its service, but it refused to restore said reduction.

10. There was a sufficient number of competent men ready and willing to take the places of the strikers, at the reduced wages, at any time, except for the violent opposition of the rioters and the fear of mob violence.

11. The first day at Painsville the supply of water for the cattle was not sufficient, but this deficiency was promptly remedied, but the crowded condition of the cattle in the yards was not corrected because it was reasonably supposed that the riot would cease, and that appellant would be able to carry the cattle to their destination without further delay, and that it would be unnecessary to enlarge the yards or to cover the same to protect the cattle from the heat of the sun.

12. After eleven days, from July 22, 1877, the strike and riot ceased, and appellant's employees resumed work on its cars, and it was restored to the possession of all its property and railroad; and as soon as the riot ceased appellant shipped appellee's cattle to East Buffalo. If it had not been for appellant's employees, who had been such up to the commencement of the strike or riot, and who had not during its continuance been discharged by appellant, and who at the expiration of this strike or riot resumed their places as appellant's servants, the appellant could have overcome said resistance, and carried appellee's cattle in due and ordinary time, and that the delay occurred by reason of the acts of appellant's employees. But, on account of the apprehension of danger, and the overpowering violence of the mob, it was not reasonably prudent or practicable to discharge the strikers during the continuance of the riot.

13. Appellee was with his cattle from the time they were shipped at Kendallville until they arrived at East Buffalo, and he went with them from Collingwood to Painsville, at appellant's request, and under its promise to pay him for his services and all his expenses as appellant's servant. His time was reasonably worth $22, and his expenses were $15 during the delay, and keeping his cattle in the yards of Painsville amounted to $40, which he paid, and which had not been repaid to him. On account of the bruised and jaded condition of the cattle, and their injuries received as aforesaid, they were largely depreciated in value, and were worth $433.50 less than they would have been if they had been carried to East Buffalo in ordinary time, and had not been bruised and otherwise injured. The appellee was not guilty of any negligence on his part.

Upon the foregoing facts the court's conclusions of law were that appellee should recover of the appellant the sum of $40 paid by him for feed of his cattle at Painsville, and $22 for his services to appellant, and $15 for his expenses, and said sum of $433.50 for his damages, making an aggregate sum of $480, for which and for his costs of suit the appellee was entitled to judgment.

The court also found, as a conclusion of law, that the appellant was not relieved by the acts of the rioters from its liability to appellee for the delay in transporting his cattle to East Buffalo, or for the injuries to his cattle.

In the outset of this opinion it was said to be clear that the special findings of facts in this case were not founded upon the first paragraph of appellee's complaint; the appellee counted exclusively upon an implied contract or agreement of the appellant as a common carrier, and sought to recover damages for an alleged breach of its common law duty, as such carrier, in the transportation of his cattle.

No reference whatever is made in this first paragraph to any special or written contract between the parties for the carriage and delivery of appellee's cattle. When, therefore, the court found, as it did, that appellee's cattle were delivered to and received by the appellant under a special contract which was at the time duly executed by the parties, it would seem that such finding would be an end of the case, as stated in the first paragraph of the complaint, and that no recovery could be had thereon. Especially so when it was agreed in such special contract, that the appellant "does not and will not assume or consent, as a common carrier, to transport live stock." In the face of this stipulation or limitation, agreed to expressly by the appellee, he cannot, as it seems to us, maintain his action against the appellant, as a common carrier, for any alleged breach of its common law duty, as such carrier, in the transportation of his cattle.

We are clearly of the opinion, therefore, that the facts specially found by the court do not, in any particular, sustain or support the averments of the first paragraph of appellee's complaint, and that there can be no recovery thereon.

We have given a full summary of the allegations of the second paragraph of the complaint; and it will be seen therefrom, that the appellee has not declared therein upon the written contract between the parties, nor sought to recover damages for an alleged breach by the appellant of the stipulations of such contract. On the contrary, in this second paragraph as in the first, he has sued the appellant as a common carrier of cattle for hire, for an alleged breach of its common law duty as such carrier, in the transportation of his cattle. The only substantial difference between the two paragraphs is the reference made to the written contract, in the second paragraph, in substance as follows:

"And the plaintiff further says that the distance from Kendallville station aforesaid to East Buffalo station is three hundred and eighty-eight miles, and by reason of the great distance and the nature of said property it was necessary that a person should accompany said cattle for the purpose of caring for and attending to them during the transit, and for the purpose of so caring for and attending to said cattle during the transit as aforesaid, it was agreed by and between plaintiff and defendant that plaintiff without extra charge should be carried by defendant without delay in the train of cars in which said cattle were to be transported from Kendallville aforesaid to East Buffalo aforesaid, and that plaintiff should attend to and care for said cattle while being transported as aforesaid, and to that end and purpose the defendant executed, as did also the plaintiff, a contract in writing, a copy of which is filed herewith, whereby the defendant agreed and promised that plaintiff should have the care of said cattle while on the grounds of the defendant, and while in transit, and should direct and control the handling and loading and unloading the same."

It is manifest, we think, by this mere reference to the written contract, the appellee did not intend to, as he did not in fact, declare upon such contract.

In the second paragraph of his complaint, he did not allege that the appellant had contracted in writing with him for the transportation of his cattle; nor did he allege, that the appellant had failed to perform the stipulations of such contract, on its part to be performed.

The court found, as a fact, that the appellee's cattle were delivered to and received by the appellant, under a special written contract executed by the parties at the time; in which contract it was expressly recited, that the appellant did not and would not assume or consent to transport live stock, as a common carrier. It was not competent for the appellee, as it seems to us, to ignore the written contract, assented to and accepted by him, for the transportation of his cattle, and to attempt, in direct contravention of the provisions of such contract, to hold the appellant liable in damages as a common carrier, for an alleged breach of its common law duty as such carrier, in the transportation of his cattle. We are of the opinion, that the case made by the court's special findings of fact is an entirely different case from the one stated by the appellee in either of the paragraphs of his complaint.

The appellee could only recover, if he recovered at all, upon and in accordance with the allegations of his complaint; and as the facts, specially found by the court, present an entirely different case from that stated by the appellee, in either paragraph of his complaint, we think that the court, as a conclusion of law upon its findings of fact, ought to have found for the appellant, the defendant below. The Indianapolis, etc., R. R. Co. *v.* Remmy, 13 Ind.

518. The Excelsior Draining Co. *v.* Brown, 38 Ind. 384, 388. The Jeffersonville, etc., R. R. Co. *v.* Worland, 50 Ind. 339.

The court erred, as it seems to us, in its conclusions of law upon the special findings of fact, for another reason.

The fourth and eighth special findings of the court, the substance of which we have heretofore given, bring the case at bar fairly within the doctrine laid down by this court, in the Pittsburg, etc., R. R. Co. *v.* Hollowell, 65 Ind. 188. In the case cited, the court said, "In cases like the present, for delay in receiving and carrying the goods, or in transporting them after they had been received, whenever the delay is necessarily caused by unforeseen disaster, which human prudence cannot provide against, or by accident not caused by the negligence of the carrier, or by thieves and robbers, or an uncontrollable mob."

And again the court said, "The fact that a railroad company has reduced the wages of its employees cannot be held to justify or excuse a mob composed of indiscriminate persons in stopping a train of cars, and delaying the receiving of goods, or the transportation of freights; nor can the railroad company be held responsible for the consequences of such unlawful proceedings, when they cause such delay."

The judgment is reversed, at the appellee's costs, and the cause is remanded with instructions to set aside the conclusions of law, and to enter as a conclusion, upon the special findings of fact, a finding for the appellant, the defendant below, and to render judgment accordingly.

Woods, J., dissents.

It is a clearly recognized principle of the common law that a carrier is not liable for delay in the transportation of goods, nor for the loss of them where such delay or loss is occasioned by the act of a public enemy. The cases, however, are very strict in their construction of the term "public enemy." A mob, no matter how overwhelming in numbers, was never originally considered as coming under this term. "If," said Lord Holt in Coggs *v.* Bernard, 2 Salk, 919, "the force used be never so great, as if an irresistible multitude of persons should rob him (the carrier), he is, nevertheless, responsible."

To the same effect are the remarks of Lord Mansfield in Forward *v.* Pittard, 1 T. R., 27: "If an armed force come to rob the carrier of his goods he is liable, and a reason is given in the books which is a bad reason, viz.: 'that he ought to have a sufficient force to repel it.' But that would be impossible in some cases as, for instance, in the riots of 1780 (the Lord George Gordon riots). The true reason is for fear it may give room for collusion, that the carrier may contrive to be robbed on purpose and share the spoil."

It was, accordingly, held in Barclay et al. *v.* Cevailla y Gana, 3 Doug. 389, where a vessel lying in the Thames, with goods on board, was seized at night by a band of eleven armed men and plundered of her cargo, that the captain was liable to the shippers for the loss and could not defend on the ground of vis major.

In the United States a number of decisions have been rendered in which this interesting question has been touched upon. It will be the aim of this note to give a summary of them.

The Indians are regarded as public enemies. In Holladay *v.* Kennards, 12 Wall. 254, this doctrine was definitely enunciated. A stage-coach crossing the prairies was attacked by hostile Arapahoes, and certain goods of the plaintiff, which the defendants had undertaken to transport, were abstracted and carried away. The court charged that the Indians were to be regarded as public enemies, and that the defendants were not liable, unless their agents in charge of the coach had been guilty of some negligence which contributed to the loss. He further stated that if such agents were cool, self-possessed, prudent, and careful, the defendants had performed their full duty. On appeal to the Supreme Court of the United States these instructions were deemed correct. The Confederate forces during the late rebellion are regarded by the courts as having been public enemies, and where goods in course of transportation were seized or delayed by them the carrier is not liable.

In Hubbard *v.* Harnden Express Co., 10 R. I. 244, the facts were these. Just prior to the breaking out of the war certain goods were forwarded from New York to Rome in Georgia. While in transitu they were seized by Confederate customs officers for non-payment of duties imposed by the Confederate Congress. Suit having been brought against the common carrier it was held that it was absolved from liability, the loss having been occasioned by the act of the public enemy.

A similar conclusion was reached in Lewis & Co. *v.* Ludwick, 6 Cold. (Tenn.) 368, where certain hides and peltries in course of transportation on the Mississippi from New Orleans to Louisville were seized and confiscated at Memphis by the Confederate forces under Gen. Pillow. In the Phila., Wilm. and Balt. R.R. Co. *v.* Harper, 29 Md. 330, the evidence showed that the train upon which the plaintiff was travelling with six trunks was stopped on July 11, 1864, at Magnolia Station by a Confederate force, the trunks removed and the cars burned. In consequence the transportation of all the plaintiff's trunks was delayed and one of them was lost, but it was held that the company would not under the circumstances have been held liable, had they not been guilty of certain subsequent negligences in caring for the plaintiff's baggage.

In Gage et al. *v.* Tirrell et al., 9 Allen, 299, a vessel bound from Boston to New Orleans was captured by a Confederate cruiser and her cargo confiscated. The goods had been shipped under a special contract whereby the carrier was exempted from liability for all perils of the sea. In this case it was not precisely determined what the status of the Confederate cruiser was. If it was a pirate, said the Court, then the exemption in the bill of lading applied; if not, and if her crew could be considered as agents of a de facto government engaged in an actually existing war with the United States then the loss happened in consequence of seizure by the public enemy, and the carrier was likewise relieved from responsibility. Even where the Confederates doing the damage were not regular troops, but merely guerrillas, it was held that they were no less public enemies. Where, therefore, the safe of an express company on a train was robbed by John Morgan and his band of raiders, it was held that the company was not liable for the loss. Bland *v.* Adam's Express Co., 1 Duval, 232. E converso, it has been held that as far as common carriers within the Confederate lines were concerned during the war, the United States troops were public enemies.

In Southern Express Co. *v.* Wonack, 1 Hask. 256, the facts were these: Certain goods were shipped from Richmond to Bristol, Tenn., via Lynchburg. They were captured en route by United States troops and destroyed. Suit having been brought against the carrier to recover for their loss the Court said:

"Are the United States troops, who, it is alleged, destroyed these goods, to be regarded as 'the public enemies' or 'the enemies of the country' in the

sense of the law, so as to excuse the plaintiff in error for the loss of the goods caused by these acts, without fault on the part of the agents of the company. . As an abstract proposition it cannot be doubted that the United States government was the rightful government, and that the war was rightfully prosecuted for the enforcement of its laws; and the attempted revolution being unsuccessful, no portion of the citizens were at any time released from their allegiance to the rightful government, however they may be excused or justified in rendering obedience to the usurped government in civil matters, so long as this obedience might have been enforced by actual military power; and we are not to be understood as announcing the proposition that in reality the United States government or troops were the public enemy of its own citizens during the progress of the war.

"But, in construing this contract and determining the rights and liabilities of the parties themselves we must give to the term 'public enemy' or 'enemy of the country,' the meaning that attached to it at the time and place the contract was made. We have seen that at the date of this transaction both parties resided within the military lines of the 'Confederate States.' We have also seen that at that time 'for most purposes' the people upon each side of the dividing line were treated as enemies of the other. So that the term 'public enemy' or 'enemy of the country,' as understood and applied by the contracting parties at the time included the troops of the United States government, and the plaintiffs in error are not, under the circumstances, to be held as insurers against loss that might occur by the act of the United States troops."

See also upon this question Smith v. Brazelton, 1 Hask. 44.

In Porcher v. Northeastern R. R. Co., 14 Rich. 181, the evidence showed that the company defendant undertook to carry certain cotton from Charleston when the country was in a disturbed state, being filled with Confederate soldiers. It was appropriated en route by these soldiers and entirely destroyed. Under the circumstances it was held that the company was liable for the loss, as it had knowingly undertaken to effect the transportation, notwithstanding the unsettled condition of the vicinity. A totally different conclusion was reached in McCrane v. Wood, 24 La. An. 406. In this case it appeared that the defendant had assumed to transport certain cotton from New Orleans at a time when the country was in a much disturbed state. The cotton was all either stolen or destroyed by Confederate troops or other marauders before it reached its destination. Yet, under the circumstances, the Court declined to charge the carrier, and since it appeared that he had been guilty of no negligence judgment was entered in his favor. A number of cases have also arisen involving questions still more closely analogous to that discussed in the principal case. In Blackstock v. N. Y. and Erie R. R. Co., 20 N. Y. 48, the facts were these: On May 15, 1874, the company defendant adopted a regulation whereby their engineers were made respectively accountable for running any train upon a switch at a station where it ought to stop. This regulation the referee found to be a reasonable one. In consequence thereof, however, 140 out of 168 engineers employed struck for a period of two weeks, during which time the transportation of certain potatoes belonging to the plaintiff was delayed. The Court held the company liable for the damage thus occasioned, reasoning as follows:

"Assuming then that abandoning their work was a breach of duty on the part of the engineers, they by this act became responsible to the defendants for all its direct consequences. The case, therefore, is one in which the actual delinquents were responsible to the defendants, but were not responsible to the plaintiff. This shows the equity of the rule which holds the master or employer answerable in such cases. Its policy is not less apparent. Those who entrust their goods to carriers have no means of ascertaining the character or disposition of their subordinate agents or servants; they have

no agency in their selection, and no control over their actions. . . . The rule which the law has adopted, by which a master is held responsible for the acts of his servants, is the one best calculated to secure the observance of good faith on the part of persons entrusted with the property of others."

No question, however, it will be observed was raised in this case as to the strikers constituting a public enemy or quasi public enemy. This was discussed in Pitts., Cinn. and St. Louis R. R. Co. *v.* Hollowell, 65 Ind. 188.

In that case it appeared that the railroad company was prevented from receiving and transporting certain cattle belonging to the plaintiff, as they had agreed to do, by reason of the forcible resistance of an armed mob who prevented the company from moving their trains. Plaintiff urged that on principle a mob was not a "public enemy," and that, therefore, the company defendant was clearly liable. The Court, however, said:

"The strict rule contended for by the appellee is applicable to common carriers only after they have received the goods for transportation and fail to deliver them at their destination, or when they are lost. In cases like the present, for delay in receiving and carrying the goods, the carrier is not an insurer, and is bound only by the general rule of liability for the breach of his contract or of his public duty as a carrier, and may be excused for delay in receiving the goods or in transporting them after they have been received, whenever the delay is necessarily caused by unforeseen disaster, which human prudence cannot provide against, or by accident not caused by the negligence of the carrier, or by thieves and robbers, or an uncontrollable mob."

In the principal case the Court would seem to have gone one step further, and to have held the existence of a mob sufficient to excuse delay in transportation even after the goods have been delivered to the carrier.

Such was the conclusion reached in Pittsburg, Fort Wayne and Chicago R. R. Co. *v.* Hagen, 84 Ill. 36. In that case plaintiff shipped certain cheese over the line of the defendant's road from Chicago to New York. While in transit a strike of the company's employees occurred, who refused to work. They were accordingly discharged and new hands were employed. The strikers, however, forcibly prevented the new hands from running the trains, in consequence of which the transportation of plaintiff's cheese was delayed and the cheese spoiled. Under the circumstances the Court held the company absolved from liability.

In Sherman, Hall & Co. *v.* Penn. R. R. Co., 3 Am. & Eng. R. R. Cas. 274. the question was not fairly raised. Plaintiffs here shipped goods under a bill of lading which contained a clause relieving the carrier from liability in case of fire. While in transit a strike occurred. An armed mob prevented all cars from moving east of Pittsburg, and when the car containing plaintiff's goods arrived there said mob forced the company to permit it to stand on the track. Within a few hours afterward some contiguous cars containing petroleum were fired by the mob. The flames communicated to plaintiff's goods and they were consequently destroyed. The Court held that it was clear that the cause of the loss was within the exempting clause of the bill of lading, and entered judgment for the defendant accordingly.

A similar conclusion was reached in Wertheimer *v.* Penn. R. R. Co., 17 Blatch. 421, where goods were lost at the same time, shipped under a similar bill of lading. In this case, however, the Court added the following:

"Where it appears, as it did here, that the fire by which the plaintiff's goods were destroyed was the act of a mob, engaged in a struggle with the military authorities of the State without anything to show that the defendants were bound from the circumstances to anticipate such a result, the defence was affirmatively established."

The latest case having any bearing upon this question is Seligman *v.* Armigo, 1 New Mex. 459. In this case defendant undertook to carry certain

liquor for the plaintiff across the plains. On the way he was stopped by a detachment of United States soldiers, and the liquor was taken from him and destroyed, it being alleged that he had been selling it to the troops and the Indians, though this was actually not the case. Suit being brought to recover the value of the liquor, defendant set up the doctrine of vis major. The strict rule of the common law was, however, applied and he was held liable accordingly.

ALBERT L. MURDOCK

v.

BOSTON AND ALBANY R. R. CO.

(*Advance Case, Massachusetts. May* 13, 1882.)

The plaintiff was improperly arrested for using a ticket which he had purchased of the company. Upon trial the court ruled that the plaintiff was entitled to recover damages for indignities which he had suffered at the hands of the police, for his mental suffering, and for sickness produced by a cold caught while confined. *Held*, that these results were too remote to come within the rule of damages applicable to an action of contract, and that the plaintiff's remedy for these wrongs is by an action of tort.

MORTON, C. J.—This is an action of contract to recover damages for a breach of the defendant's contract to carry the plaintiff as a passenger on its railroad from Springfield to North Adams. It appears at the trial that the plaintiff bought a ticket at Springfield which entitled him to be carried to North Adams; that the defendant's conductor refused to receive the ticket, and when the train arrived at Pittsfield the conductor, who was a railroad police officer, arrested the plaintiff for evading his fare and delivered him into the custody of two police officers of Pittsfield, who detained him during the night in the place of detention provided for arrested persons. The learned justice, who presided in the Superior Court, ruled that the plaintiff was entitled to recover damages for this arrest and imprisonment, for indignities which the plaintiff claimed that he suffered at the hands of the Pittsfield police officers, for his mental suffering and for sickness produced by a cold caught while confined. The distinction between the rules of damages applicable in actions of contract and of tort appears to have been overlooked at the trial. Without inquiring whether all the elements of damage admitted by the court would be competent if this had been an action of tort for an assault and false imprisonment, we are of opinion that too broad a rule was adopted in this case.

Damages for a breach of a contract are limited to such as are the natural and proximate consequences of the breach, such as may fairly be supposed to enter into the contemplation of the par-

ties when they made the contract, and such as might naturally be expected to result from its violation.

The detention of the plaintiff during the night, his discomforts in the place of detention, the cold which he took by the dampness of the cell and the indignities he suffered from the police officers of Pittsfield were not the immediate consequences of the breach of the defendant's contract to carry the plaintiff to North Adams. They were the results of intervening causes, not the primary but the secondary effects of the breach of contract, and are too remote to come within the rule of damages applicable in an action of contract. Hobbs *v.* London and Southwestern Ry., L. R. 10, Q. B. 111.

The plaintiff's remedy for these wrongs if proved is by an action of tort. The defendant was not required to be ready to meet and contest these questions under a declaration alleging a breach of a contract to carry the plaintiff to North Adams.

Exception sustained.

PHILADELPHIA AND READING R. R. CO.

v.

ANDERSON.

(94 *Pennsylvania, State Reports*, 351. *May* 20, 1880.)

Where, for a consideration, a railroad company undertakes to transport a passenger from one point of its line to another, there arises an implied contract on the part of the company that it has, for that purpose, provided a safe and sufficient road, and that its cars are safe and trustworthy.

Where a passenger is injured by an accident arising from a collision, or a defect in the machinery or roadway, he is required, in the first place, to prove no more than the fact of the accident and the extent of the injury; a prima facie case is thus made out, and the onus is cast upon the carrier to disprove negligence.

This prima facie presumption may be overthrown by proof, to the satisfaction of the jury, that the injury complained of resulted from inevitable accident, or from something against which no human prudence or foresight could provide.

Where an accident occurs by reason of the washing away of an embankment of a railroad because of insufficient drainage, the company will not be relieved of liability by the fact that the road was constructed under the supervision of a competent engineer, and that the drainage, at the point of the accident, was provided for in a manner directed and approved by him.

The fact that the defendant is the lessee of the road does not relieve it from the consequences of its own negligence, and it was bound to see that the road, whether owned or leased, was safe and sufficient between the points named on the passenger's ticket.

Where questions should not have been allowed, but the answers thereto are unexceptionable, this court will not reverse therefor.

Laing v. Colder, 8 Barr. 479; Sullivan v. R. R. Co., 6 Casey, 234; Meier v. R. R. Co., 14 P. F. Smith, 225; R. R. Co. v. Napheys, 9 Norris, 135, followed; and Mansfield Coal Co. v. McEnery, 10 Id. 185, distinguished.

MAY 7th, 1880. Before Mercur, Gordon, Paxson, Trunkey and Sterrett, JJ. Sharswood, C. J., and Green, J., absent.

Error to the Court of Common Pleas of Lancaster County: Of May Term, 1880, No. 106.

Trespass on the case by Harman Anderson against the Philadelphia and Reading R. R. Co., to recover damages for injuries alleged to have been received by reason of the negligence of defendant.

The declaration averred that Anderson on the 4th of October, 1877, was a passenger in the cars of the defendant company; that while passing over the line of the Pickering Valley R. R., which was leased and operated by the defendant, he was injured by the car in which he was riding, being thrown from the track in the vicinity of Kimberton station, on the line of said road.

In the first count there was an averment of negligence on the part of the defendant and its servants generally in the management of the train.

In the second count, after an averment of the duty of the defendant to use proper care and skill in maintaining and keeping its tracks so that the plaintiff might be safely carried, of making up its train in a proper and safe manner, and of placing the locomotive in such a way that its headlight might show the condition of the track, it was alleged that by reason of a break in the track and embankment supporting it near Kimberton station, and by reason of the negligence of the defendant and its servants, the car in which the plaintiff was riding was thrown from the track, and plaintiff was injured.

In the third count, after an averment of the duty of the defendant to keep and maintain the track, embankments and culverts in good repair, and to erect and maintain culverts and drains suitable to pass water under the embankments wherever it was likely to flow, it was alleged that by reason of a washout of an embankment on the Pickering Valley road, caused by the negligence of the defendants and its servants, the car in which plaintiff was riding was thrown from the track.

At the trial, before Livingston, P. J., it appeared that Harman Anderson, on October 4th, 1877, purchased a ticket at Chester Springs station on the Pickering Valley R. R., to go to and return from Schwencksville, a station upon the Perkiomen R. R. Both the Pickering Valley and Perkiomen railroads were at that time operated by the Philadelphia and Reading R. R. Co. as lessee. The journey to Schwencksville was safely accomplished, and in the afternoon plaintiff left that place upon his return trip. The train in which he was a passenger arrived at Perkiomen Junction some

time before six o'clock, at which place, having changed cars, he proceeded by the main line of the Reading R. R. to Phœnixville, about two and a half miles, and having again changed cars at that point, proceeded, at 5.58 P.M., in a train of the Pickering Valley road, for his destination, Chester Springs. This latter train consisted of the engine reversed, two passenger cars and a milk-car, in the order named, and had proceeded about two and a half miles to a point a little east of Kimberton, when it was wrecked by running into a chasm formed by the washing out of an embankment, and Mr. Anderson, who was seated in the front part of the second passenger car, received the injuries, to recover compensation for which the present action was brought. The engine and the two passenger cars fell into the chasm; the milk-car was left standing upon the brink. A number of the passengers were killed, as were also the engineer and fireman of the train, and many more were injured.

No previous warning or signal of danger had been given by the engineer of the train, and as one of the plaintiff's witnesses testified, the first he knew of any danger was when he "felt a jolt in the car, and the lights all went out, and the hind end of the second car came crushing in on us."

The train had been running slowly, with the headlight burning.

The washing out of the embankment occurred during an unusual storm of rain and wind, which the defendant contended was of such a character as to defy all reasonable precautions adopted for the safety and security of the embankment, and that its destruction was due to an "act of God."

The plaintiff, however, contended that the accident was caused, not solely by the storm, but by that combined with the negligence of the defendant in running the train with the engine reversed, and with the cars in the position they were, and in not constructing the embankment in a proper manner.

The defendants, inter alia, submitted the following points, to which are appended the answers of the court:

6. If the jury find that the railroad was constructed by the Pickering Valley R. R. Co. under the supervision of a competent engineer, that the drainage at the place where the accident occurred was provided for in a manner directed or approved by him, that the road was thereafter leased to the defendants, and that the embankment at the said place was subsequently washed out by a storm of unusual and extraordinary violence, then the defendants are not liable for any error of judgment on the part of such engineer as to the drainage, even if such error occasioned the accident.

Ans. "The sixth point we cannot affirm as stated. If the jury find from the evidence that the railroad was constructed by the Pickering Valley R. R. Co. under the supervision of a competent engineer, that the drainage of the embankment where the accident

occurred was constructed in the manner directed and approved by him, was sufficient for the purpose of draining the area stated in the testimony in cases of ordinary and usual rainfalls and storms without injury to the embankment, that it was leased to the Philadelphia and Reading R. R. Co., and the drainage continued to be sufficient in cases of ordinary rainfalls and usual storms, up to the time of the accident, and that it was then washed out and broken by an unusual and extraordinary storm alone, the defendant would not be liable. But the fact that defendant had leased the road from another (who constructed it) and operated it, carrying passengers upon it, will not shield defendant from liability where an injury is sustained by reason of its negligence. Defendant is a common carrier of passengers, and as such is bound to see that its road, whether owned or leased, is safe and sufficient between the points indicated on the passenger's ticket. That is implied by his contract, and the condition of the rails and road-bed is a matter of at least equal importance to passengers with the condition of the cars in which they ride, and the road-bed must not only be properly constructed, but must be kept in good condition, at least so far as the carrier can secure it by care and diligence, and if defendant failed so to do it would be liable though only a lessee in the same manner and to the same extent as if it had constructed the road itself. For if there is any one duty more than another imperatively incumbent upon a railroad company, it is to have their track in a sound and safe condition."

7. That there is no evidence from which the jury can find the defendants liable to the plaintiff for the alleged negligence of running the locomotive backward with the tender in front.

8. That there is no evidence from which the jury can find the defendants liable to the plaintiff for the alleged negligence of running the train with the milk-car in the last place.

Ans. "We answer these points affirmatively. The matters contained in these points would not be sufficient without proof that they caused the accident or contributed directly to it; but the jury will consider the evidence relating to the matter contained in these points with the other evidence in the cause, in deciding whether or not defendant has been guilty of negligence."

In the general charge, the court, inter alia, said:

The Supreme Court of Pennsylvania has said that [when a railroad company undertakes the transportation of a passenger for an agreed price, the contract implies that they are provided with a safe and sufficient railroad to the point indicated; that their cars are staunch and roadworthy.] (Fourteenth assignment of error.) That means have been taken beforehand to guard against every apparent danger that may beset the passengers; and that the servants in charge are tried, sober and competent men; that when in the performance of this contract a passenger is injured without

fault on his part, the law raises prima facie a presumption of negligence and throws on the company the onus of showing that it did not exist; [that where a passenger, seated as Mr. Anderson has shown you he was, in a railroad car, is injured in a collision, or by the overthrow of a car, the breaking of an axle or other part of the machinery, he is not required to do more in the first instance than to prove the fact and show the nature and extent of his injury. A prima facie case is thus made out, and the onus is cast upon the carriers to disprove negligence.] . . . (Fifteenth assignment.)

The plaintiff having proven that he purchased a ticket from a ticket agent of the railroad company at Chester Springs, entitling him, for the consideration paid, to a passage from that point to Schwencksville and return, on October 4th, 1877; that he entered the cars on that day and seated himself therein as a passenger, and while in their car as a passenger he was injured at the time and place and in the manner stated by the witnesses; the law raises a presumption that his injuries were caused by the negligence of the defendant, which presumption may be rebutted by the defendant; [but plaintiff, by his proofs presented, made out what is termed in law a prima facie case, which, had the defendant offered no evidence, would have entitled him to a verdict, and which threw on the defendant the onus or burden of disproving negligence.] . . . (Sixteenth assignment.)

[The presumption of law is, as we have stated to you, that the injuries of the plaintiff were caused by negligence on the part of the defendant. This legal presumption, which is only an inference from general experience, remains in force until a countervailing presumption of fact is established. It may be overthrown and repelled by the defendant proving to the satisfaction of the jury that the injury complained of resulted from "inevitable accident," or, as it is more commonly termed, the "act of God," or that it was caused by something against which no human foresight and prudence could provide.] (Seventeenth assignment.)

The other material questions raised in the court below will be found stated in the opinion of this court.

The verdict was for the plaintiff for $3500, and after judgment thereon the defendant took this writ, and alleged that the court entered, inter alia, as set forth in the above assignments of error.

James E. Gowen, H. M. North, and James Boyd, for plaintiff in error.—To make a railroad company liable to a passenger for injuries there must be shown a want of due care on the part of the company: Meier *v.* Pennsylvania R. R. Co., 14 P. F. Smith, 225; Adams Express Co. *v.* Sharpless & Sons, 27 Id. 516. The carrier of passengers does not, by his contract, warrant the roadworthiness of his road and cars. He contracts for and is obliged only to take due care to carry the passengers safely: McPadden *v.* N. Y. C. R. R. Co., 44 N. Y. 478; Reedheard *v.* Midland R. R. Co., 2 Q. B.

412; 4 Id. 379. It does not suffice for one suing for an injury received whilst a passenger in the defendant's cars, to prove simply that while being so carried he received an injury. The nature of the accident, and the circumstances attending it, must be such as have a tendency to prove negligence: Lackawanna and Western R. R. Co. *v.* Napheys, 9 Norris, 135; Le Barron *v.* East Boston Ferry Co., 11 Allen (Mass.), 312; Latch *v.* Runmer Ry. Co., 3 H. & N. 930; Deyo *v.* New York Central R. R. Co., 34 N. Y. 9. Here the carrier of passengers had shown that the embankment had been destroyed by an extraordinary storm, and it surely cannot be the law that he is bound to go further and show another defence to the action, namely, want of negligence upon his part. It would in effect be requiring him to prove two facts as a defence, the "act of God" and "due care" upon his part, either one of which would be a sufficient defence. See Memphis and Charleston R. R. Co. *v.* Reeves, 10 Wallace, 176; Farnham *v.* Camden and Amboy R.R. Co., 5 P. F. Smith, 53; Express Co. *v.* Sands, Id. 140; Patterson *v.* Clyde, 17 Id. 500; Forbes *v.* Dallet, 9 Phila. R. 515; Livezey *v.* Philadelphia, 14 P. F. Smith, 106.

The court erred in the instruction to the jury that to entitle the plaintiff to claim exemption by reason of the act of God, the act must have been of such a character that no human foresight and prudence could have provided against it: Whart. on Negligence, sec. 557; Philadelphia and Reading R. R. Co. *v.* Adams, 8 Norris, 31; Pennsylvania R. R. Co. *v.* Fries, 6 Id. 234. In providing drainage for the embankment, if the plans and directions of a competent and skilful engineer were followed, the defendant was relieved from all liability for the results of the accident: Ardesco Oil Co. *v.* Gibson, 13 P. F. Smith, 146; Mansfield Coal Co. *v.* McEnery, 10 Norris, 185.

John H. Brinton, William Aug. Atlee, Charles H. Pennypacker, and B. F. McAtee, for defendant in error.—The charge of the court is in the language used by Judge Woodward in Sullivan *v.* Philadelphia and Reading R. R. Co., 6 Casey, 234, which is twice referred to and approved in Meier *v.* Pennsylvania R. R. Co., 14 P. F. Smith, 225, and approved in ipsissimis verbis in Delaware, Lackawanna and Western R. R. Co. *v.* Napheys, 9 Norris, 135. If the injury was occasioned by the error of the engineer, then the engineer was not competent or he would not have committed the error; if it was occasioned by his negligence, then the defendant is responsible, for while carriers of passengers do not insure the safety of passengers, they certainly do contract that there has been no negligence in the construction or maintenance of the roadway or rolling-stock, and that there will be none in the running of the train. Nor can it make any difference that the defendant here occupies the position of a lessee. It was the carrier and it was the party to the contract; it contracted with the defendant that there had been

no negligence in the construction or maintenance of the roadway over which it agreed to carry him, and that contract having been broken, it must answer for the breach. In Grote *v.* Chester and Holly-head R. R. Co., 2 Exch. Rep. 251, cited and approved in Francis *v.* Cockrell, Law Rep. 5 Q. B. 184, the court says: "It cannot be contended that the defendants are not responsible for the accident merely on the ground that they have employed a competent person to construct the bridge." See also Brehm *v.* The Great Western Ry. Co., 34 Barb. 275.

GORDON, J.—As those rulings of the court below which put the burden of proof upon the defendant, plaintiff in error, have been treated in the argument in this court as of primary importance, we will first examine and dispose of the exceptions to them. These exceptions are numbered, respectively, 14, 15, 16 and 17, and the rulings of which they complain may be summed up as follows: that where for a consideration a railroad company undertakes to transport a passenger from one point of its line to another, there arises an implied contract, upon part of the company, that it has, for that purpose, provided a safe and sufficient road, and that its cars are sound and roadworthy; that where the passenger is injured by any accident arising from a collision or defect in machinery, he is required, in the first place, to prove no more than the fact of the accident and the extent of his injury; that a prima facie case is thus made out, and the onus is cast upon the carrier to disprove negligence; that, in the case trying, the legal presumption was that the injuries to the plaintiff were caused by the negligence of the defendant, and that this presumption continued until a countervailing presumption of fact was established. To this the learned judge added, that this prima facie presumption might be overthrown by proof, to the satisfaction of the jury, that the injury complained of resulted from inevitable accident, or from something against which no human prudence or foresight could provide. Now, we must say, the able argument of the learned counsel to the contrary notwithstanding, that a better summary of the law governing cases of this kind could scarcely have been framed. It is, indeed, almost a transcript of the ruling of this court, as delivered by Mr. Justice Woodward, in Sullivan *v.* The R. R. Co., 6 Casey, 234. The case referred to being in point, it ought, of itself, to settle this part of the present contention, unless there are other cases on our books which teach a contrary doctrine. But, so far from this being so, the very contrary is the fact. In Laing *v.* Colder, 8 Barr, 479, Mr. Justice Bell says, when speaking of the responsibility of passenger carriers: "But though in legal contemplation they do not warrant the absolute safety of passengers, they are yet bound to the exercise of the utmost diligence and care. The slightest neglect against which human prudence and foresight may guard, and by which

hurt or loss is occasioned, will render them liable to answer in damages. Nay, the mere happening of an injurious accident raises, prima facie, a presumption of neglect, and throws upon the carrier the onus of showing it did not exist. This punctilious attention to the safety of the passenger embraces the duty of providing strong and sufficient carriages, or other conveyances for the journey, in every respect, sea, road and river worthy; safe and steady horses, or other means of progression, and skilful drivers, conductors and other agents, whose duty it is to use every precaution against danger." This language is certainly very strong, full and to the point, and Sullivan *v.* The R. R. Co. is but an iteration of it. Both these cases are cited by Mr. Justice Agnew in Meier *v.* The R. R. Co., 14 P. F. Smith, 225, and their language reiterated. Furthermore, in the case of the Delaware, Lackawanna and Western R. R. Co. *v.* Napheys, 9 Norris, 135, Mr. Justice Sterrett makes use of the following language: "If a passenger seated in a railroad car is injured in a collision, or by the overthrow of a car, the breaking of a wheel, axle or other part of the machinery, he is not required to do more, in the first instance, than to prove the fact, and show the nature and extent of the injury. A prima facie case of negligence is thus made out, and the onus is cast upon the carrier to disprove negligence." It is thus manifest, that the rulings of the learned judge of the court below, on this point, are abundantly supported by the rulings of this court, and that the exceptions taken thereto must be dismissed. In immediate connection with this part of the case, the refusal of the court to affirm the defendant's sixth point may be considered. That point required the instruction, that if the railroad in question had been constructed under the supervision of a competent engineer, and that the drainage, at the place where the accident happened, was provided for in a manner directed and approved by him, that subsequently the road was leased to the defendant, and that the embankment was washed out by a storm of unusual violence, the defendant was not liable for any error of judgment of the engineer, even if such error occasioned the accident. This point, curiously enough, draws upon the doctrine of inevitable accident to help out a principle of law, sufficiently strong, in a proper case for its application, to stand alone. It is a principle, the latest enunciation of which is found in the case of the Mansfield Coal and Coke Co. *v.* McEnery, 10 Norris, 185, in which it was held to be a sufficient answer to an action brought by an employee, for an injury resulting from the falling of a bridge of the company by which he was employed, that such bridge had been built by a competent builder. But this doctrine can have no application to the case in hand, and for the very good reason that a passenger is not an employee. The one by his contract is presumed to run the ordinary risks of the machinery and appliances he is engaged to supervise or use; he is

also held to a knowledge of the character and obvious defects of such machinery and appliances, as well as the skill and habits of his co-servants. A passenger, on the other hand, neither can know, nor is presumed to know, anything about these things. He has paid for his passage, and he is wholly passive in the hands and at the mercy of the transportation company and its agents. The doctrine advocated by the defendant's counsel, by which the passenger would be put on a par with an employee, will not do; it accords neither with reason nor precedent. The cases of Grote v. The Chester and Hollyhead R. R. Co., 2 Ex. 251, and Francis v. Cockrell, Law Rep., 5 Q. B. 184, are full in point. In the former, the action was by a passenger against a railroad company for damages resulting from the breaking down of a bridge whilst the train was passing over it, and it was held, that whilst it was a question for the jury, whether the defendant had engaged competent engineers, who had adopted the best method and used the best materials in the construction of the bridge, yet the mere fact of its having engaged such persons would not relieve it from the consequences of an accident arising from a deficiency in the work. In the latter, the action was for damages resulting to the plaintiff from the breaking down of a grand stand, erected for the viewing of certain races, and which had been built by a competent person, and leased to the defendant, he, the defendant, having received a compensation from the plaintiff for admission to the stand; it was held, that the plaintiff could sustain an action against the defendant for the damage thus sustained, although the defendant was, himself, free from all negligence, and had employed a competent person to erect the stand. In view of these authorities, we have no doubt but that this sixth point was properly refused, and that the court was right in saying to the jury that the mere fact of the defendant being a lessee of the road did not release it from the consequences of its own neglect, and that it was bound to see that its road, whether owned or leased, was safe and sufficient between the points indicated on the plaintiff's ticket. The defendant's counsel, however, most earnestly contends that these rules do not apply to the case in hand, because the accident was occasioned by a condition of things which the company could neither foresee nor provide against; that it was the immediate result of the great rain storm which occurred at that time; a storm unprecedented in the history of the country, and one which set at defiance all human skill and prudence. This, however, was the very point in controversy, and the learned judge told the jury that if the facts were as above stated, they must find for the defendant.

But he also told them that if the immediate cause of the disaster was the want of a proper construction or drainage of the embankment, the fact of the storm would not, of itself, avail as a defence.

In this we think he was correct. The engineers who were examined on part of the plaintiff were of the opinion that the embankment was not properly drained, that the arrangements for that purpose were faulty, and that had there been a culvert through it of proper dimensions, the rain-fall, great as it was, would have produced no serious impression upon it. It is true, indeed, that the experts produced upon part of the defendant were of a different opinion. But the jury believed the former rather than the latter; this they had a perfect right to do, and so the matter ends so far as either this court or the court below is concerned. In this connection we may notice the complaint embodied in the tenth assignment. John A. Wilson was asked by the defendant's counsel what practical experience he had as to the effect of a down-pour of rain upon a strong and well-built railroad embankment, when the case was not complicated by any question of drainage. On objection this question was ruled out. About the rectitude of this ruling we might have some doubt, but as the question was immediately afterward put in a slightly different form, and without objection, fully answered, we cannot see that the defendant has anything material of which to complain. The proposal to prove, by the same witness, that water is used in hydraulic mining, and that it gains force by being thrown from an elevation, was properly ruled out, since, however well it might have served to illustrate hydraulic mining in the west, it had nothing to do with the case in hand. The exceptions covered by the 3d, 4th, 5th, 6th, 7th, 8th and 9th assignments, seem, at first blush, far more serious, and the questions therein stated ought not to have been allowed; nevertheless, an examination of the testimony satisfies us that no harm was done thereby to the defendant, since the answers were such, and such only, as the plaintiff would have been entitled to had the question been properly framed. The questions complained of were, "What, in your opinion, would be a proper method of building the road at that point?" and, "What, in your judgment, would it be proper for the lessee or user of a railroad to do at a point like that, if he saw, when he took possession, no provision for drainage?" The first of these is objectionable in that it is too general and indefinite, and calls upon the witness for his opinion, not only upon what ought to have been done to insure the permanence and stability of the road at the point in controversy, but also, as to how it ought to have been constructed in every and all particulars, though such particulars might be foreign to the matter in issue—the proper drainage of the embankment. The second is less objectionable, since it calls the attention of the witnesses to the controverted point, the drainage as above stated. When, however, we come to examine the answers of the experts, we find them such as were legitimate and proper. Mr. Slaymaker says, "I would

certainly adopt some way of passing the water which should gather in that basin." Mr. Wright: "I should think the proper thing would be to make provision for drainage such as the circumstances seemed to require." Mr. Sharpless: "I think it would be his duty," that is the lessee's, "to provide some means of drainage to get rid of the water;" and the testimony of Messrs. Osborne and Mifflin is of the same import. It will thus be seen that whilst the questions were not such as they ought to have been, the answers were unexceptionable, hence, no injury resulted to the defendant from the error committed by the court. Again, complaint is made of the answers to the defendant's 7th and 8th points. These points required the court to instruct the jury, that there was no evidence from which they could find the defendant liable to the plaintiff for alleged negligence in running the locomotive backwards, with the tender in front and milk-car in the rear. The answer was as follows: "We answer these points affirmatively. The matters contained in these points would not be sufficient without proof that they caused the accident, or contributed directly to it; but the jury will consider the evidence relating to the matters contained in these points with other evidence in the case, in deciding whether or not defendant has been guilty of negligence." This answer is somewhat ambiguous, but as it is more favorable to the defendant than it ought to have been, we cannot understand why it is complained of. Three locomotive engineers say that an engine running backwards cannot be so readily handled as when in its proper position, and that the light is unsteady and unreliable. Indeed, any one might know that running an engine hind end foremost, with the tender in front, especially at night and in a storm, when the utmost vigilance is required, was, in itself, a dangerous circumstance. Then, as to the position of the milk-car, it is sufficient to say that the defendant's own rules condemned that, and pronounced such an arrangement dangerous. In this instruction the court erred, but the error consisted in not negativing, and that emphatically, the defendant's points. We next turn to the first assignment, which complains of the admission of the question put on part of the plaintiff, "What is your estimate of your injuries in money?" This question ought not to have been permitted, but the exception is rather to the question than to the answer, for the answer simply amounts to nothing. It was, "I would sooner have my health than ten thousand dollars." This, of course, comes to nothing in the way of fixing value, and it was so treated by the court, for the jury was instructed that, upon this subject there was no evidence, and under proper directions that body was allowed to fix the damages as they should think just from all the circumstances of the case. Moreover, that this testimony produced no effect upon the jury is obvious from the verdict.

The error thus being harmless, we cannot reverse the case on account of it. In the remaining exceptions we discover nothing requiring comment, and without more they are dismissed.

Judgment affirmed.

A motion for a re-argument was subsequently made, which the court, on June 21st, 1880, refused.

The important points raised in the principal case are two in number, viz.:

1. What is it necessary for the plaintiff to prove in actions brought against railway companies for injuries occasioned to passengers, in order to make out a prima facie case?

2. How far is the duty of a railway company to a passenger discharged by the employment of careful and responsible parties to construct its vehicles and road bed?

These will be considered in succession.

1. It is laid down by some authorities that the mere happening of an injurious accident raises, prima facie, a presumption of neglect on the part of the company, and throws upon it the onus of showing that such neglect did not exist. Laing v. Colder, 8 Penn. St. 479; Galena, etc., R. Co. v. Yarwood, 17 Ill. 509; Romp v. Wilmington, etc., R. Co., 9 Rich. Law, 84; Stokes v. Saltonstall, 13 Pet. 181; Christie v. Griggs, 2 Camp, 79.

It is believed, however, that this is by far too broad a statement of the law. It is not every accident occurring to a passenger upon a railroad which can be viewed as raising a prima facie presumption that the company has been in fault.

The injury may be caused by something wholly disconnected with the duty of the company in relation to a passenger, as, for example, by a shot fired by a person standing alongside of the track. The mere proof of such an injury would surely raise no presumption of neglect on the part of the company. Kansas Pacific R. R. Co. v. Miller, 2 Col. 442; Curtis v. Rochester and Syracuse R. R. Co., 18 N. Y. 534.

So where the injury has been occasioned by some voluntary act of the passenger, which, though not amounting to contributory negligence, has nevertheless been the sole cause of the injury. Here also no presumption of negligence on the company's part can be said to arise from the mere fact of the accident's having occurred. Thus where a passenger, by a voluntary motion, caught his hand in a car door, which, swinging to, inflicted an injury upon him, it was held that the plaintiff had not made out his case by simply proving the occurrence of the accident, but must, in order to entitle him to recover, prove further some radical defect in the construction or order of the door. Metropolitan R. R. Co. v. Jackson, L. R., 3 App. Cas. 193. A similar doctrine was enunciated, where the plaintiff's decedent, in getting off the cars, fell from the platform and was crushed under the wheels. Railroad Co. v. Mitchell, 11 Heisk, 400. The same principle applies where the accident is the result of some alleged defect or deficiency equally evident to the plaintiff and to the company. Here too mere proof of the occurrence of the accident is insufficient to sustain the plaintiff's case. Thus in D., L. & W. R. R. Co. v. Napheys, 1 Am. and Eng. R. R. Cas. 52, where the injury to the plaintiff was occasioned by her being obliged to jump down a car step which was alleged to be of unusual height, it was held that she was bound to prove affirmatively that the company was negligent in providing so high a step before she would be entitled to recover. See also Le Barron v. East Boston Ferry Co., 11 Allen, 312, where the same doctrine was announced in a case where the plaintiff was injured by reason of a jolt of his wagon, occasioned

by the construction of the flap of the defendant's ferry-boat, in such manner that it did not unite perfectly with the surface of the wharf.

The true rule which is applicable is thus laid down in Shearman and Redfield on Negligence, § 278, p. .

"The law requires in an action against a carrier for injuries suffered by a passenger, prima facie proof that the proximate cause of such injuries was the want of something which, as a general rule, the carrier was bound to supply, or the presence of something which, as a general rule, the carrier was bound to keep out of the way, under the circumstances of the case so far as they appear. Having established so much, the plaintiff is entitled to recover, without proving affirmatively that the surrounding circumstances were of that ordinary character to which the general rule was meant to apply."

It is believed that this statement of the law is substantially borne out by the authorities. The reasons which have led the courts to adopt it are thus admirably stated by Selden, J., in Curtis v. Rochester and Syracuse R. R. Co., 18 N. Y. 534.

"In regard to the carriages and other apparatus used for the carrying of passengers, railroad companies are under the same obligation as in the case of the carrier upon common roads. They make and own their road, and have the exclusive control of that and of every part of the machinery and apparatus used in connection with it. Passengers have no means of knowing, nor any power of remedying its defects, but are forced to trust their lives and persons to the care and watchfulness of the agents of the company. The latter is therefore bound to see that the road and all its appurtenances are in perfect order and free from any defect which the utmost vigilance, aided by the highest degree of knowledge and skill, could discover or prevent.

"Consequently, whenever it appears that the accident was caused by any deficiency in the road itself, the cars or any portion of the apparatus belonging to the company and used in connection with its business, a presumption of negligence, on the part of those whose duty it was to see that everything was in order, immediately arises; it being extremely unlikely that any defect should exist of so hidden a nature that no degree of skill or care could have foreseen or discovered it."

Accordingly it has been held that where the accident is occasioned by the giving way of an embankment, proof of the occurrence of the accident alone constitutes a prima facie case for the plaintiff. Great Western R. R. Co. v. Braid, 1 Mov. P. C. C. (N. S.) 101, contra; Withers v. North Kent R. Co., 27 L. J. (Exch.) 417. So where the accident has been occasioned by the train running off the track. Carpue v. London, etc., R. Co., 5 Q. B. 749; Sullivan v. Phila., etc., R. Co., 30 Pa. St. 234; Pittsburg, etc., R. Co. v. Thompson, 56 Ill. 138, contra; Bird v. Great Northern R. Co., 28 L. J. 3. Or by collision with another train. New Orleans R. Co. v. Allbritton, 38 Miss. 242. Or with an object projecting from another train on a parallel track. Walker v. Erie R. R. Co., 63 Barb. 260. Or by the breaking down of the cars or engine. Meier v. Pennsylvania R. R. Co., 64 Pa. St. 225; Toledo, etc., R. R. Co. v. Beggs, 85 Ill. 80. Or by the striking of some unknown substance against the cars. Holbrook v. Utica, etc., R. Co., 12 N. Y. 236. Or by the jolting of the cars while switching. R. R. Co. v. Pollard, 22 Wall. 341. Or by the striking of an animal straying upon the track. Bowen v. New York, etc., R. R. Co., 18 N. Y. 408. Or by the destruction of a bridge. Sawyer v. Hannibal and St. Jo. R. R. Co., 37 Mo. 240.

Similar decisions have been rendered in actions against other common carriers for injuries to passengers. Accordingly it has been held in actions against stage proprietors that where the accident occasioning the injury occurred by reason of the overturning of the stage, proof of its occurrence constituted a prima facie case. Stokes v. Saltonstall, 13 Pet. 181; McKenney v. Neill, 1 McL. 540; Fairchild v. Cal. Stage Co., 13 Cal. 599. So where it

was occasioned by the coming off of the wheel. Ware v. Gay, 11 Pick. 106. Or by the horses kicking through the panel. Simpson v. London, etc., Omnibus Co., L. R., 8. C. P. 390. Or starting out while the passenger is alighting. Roberts v. Johnson, 58 N. Y. 613. Or by the bursting of a lamp, the burden of proof being on defendant to prove that the oil used was good and non-explosive. Wilkie v. Bolster, 3 E. D. Smith, 327.

And in an action against a steamboat company for injuries occasioned by the bursting of the boiler of a steam vessel, the plaintiff by proving the accident will be deemed to have made out a prima facie case.

2. It seems to be well settled that the duty of a railroad company to its employees to furnish a safe road bed and suitable rolling stock is discharged if careful and competent persons be employed to construct the road bed and manufacture the rolling stock. But the law is far otherwise as regards passengers. The duty of the railroad company to them in this respect is much more mperative. Even if careful and competent persons be employed, the railroad company will notwithstanding be liable for any defect in their work which could have been prevented by the exercise of extraordinary care and diligence; such persons being deemed merely the agents or servants of the company.

This rule applies with relation to the manufacture of rolling stock. Hegeman v. West R. Corp., 13 N. Y. 9; Carroll v. Staten Island R. R. Co., 58 N. Y. 126; Caldwell v. New Jersey Steamboat Co., 58 N. Y. 126; Burns v. Cork, etc., R. Co., Irish R., 13 C. L. (N. S.) 543. See contra, Grand Rapids, etc., R. Co. v. Huntley, 38 Mich. 537. And was applied in the first of the above-named cases with perhaps undue severity. The accident which had occasioned the injury, to recover damages for which suit was brought, had been occasioned by the breaking of an axle on one of the defendant company's cars. The court charged as follows:

"Although the defendant purchased his axles and cars of extensive and skilful manufacturers, who in the exercise of their skill knew of no test and used no test to discover latent defects in axles, yet if there were any tests known to others, and which should have been known and employed by the manufacturers, as men professing skill in their particular business . . . defendant was guily of negligence in not using this test, provided the injury occurred to the plaintiff by reason of a defect which, by such test, might have been discovered."

On appeal this instruction was approved and sustained in an elaborate opinion. The rule above laid down also applies to the construction of the road bed. Thus where the injury was occasioned by the rolling of a large stone from an embankment upon a passing train whereby a passenger was injured, it was held that the railway company could not shield itself from liability by showing that it had employed a competent person to construct the embankment. Virginia, etc., R. R. Co. v. Sanger, 15 Gratt. 230. A similar doctrine was held where the injury was occasioned by the breaking of a bridge. Grote v. Chester, etc., R. Co., 2 Exch. 251; Brehm v. Gt. Western R. Co., 34 Barb. 256.

See also Francis v. Ackrell, L. R., 5 Q. B. 184, and the instructions of Wightman, J., in Brazier v. Polytechnic Institute, 1 F. & F. 507. See note to D., L. & W. R. R. Co. v. Napheys, 1 Am. & Eng. R. R. Cases, 52.

See as to obligation of railroad companies with reference to the construction of embankments, ordinary and extraordinary floods, etc., note to Balt. & Ohio R. R. Co. v. Sulphur Spring Independent School District, 2 Am. & Eng. R. R. Cas. 166.

HOUSTON AND T. C. R. R. CO.

v.

JOHN P. SHAFER.

(54 *Texas Reports*, 641. *April* 11, 1881.)

An amendment which was filed to a pleading before the adoption of the present rules by the supreme court did not have the effect to withdraw the pleading amended, or to suppress or supplant any of its allegations, except in so far as the amendment effected that result by legal construction.

See statement for facts pleaded, as a basis for special damage, which were held to have been sufficiently specific.

An assignment of error embracing in general terms all the charges and instructions given by the court is too general, and will not be considered.

In a suit against a railway company for injury, which the plaintiff alleged he had received while a passenger, from the negligent and wrongful management of its train, his expressions indicating pain uttered after the alleged injury are admissible in evidence as part of the res gestæ. Whether his suffering was real or feigned was a question for the jury.

See statement of case for facts held sufficient to sustain a verdict for fifteen hundred dollars damages against a railway company, for producing a more aggravated condition of hernia than had before existed, caused by its cars running off the track, whereby plaintiff was shocked, and thus damaged.

APPEAL from Robertson. Tried below before the Hon. Spencer Ford.

Suit brought by Shafer to recover damages for personal injuries received on the defendant's railway in December, 1874, while a passenger from Bremond to Hearne, in Robertson county. The defendant filed general and special demurrers, general denial, plea of contributory negligence and plea of not guilty. Verdict and judgment was rendered for plaintiff for $1,500.

Appellant assigned as error, among other things, the following:

"The court erred in overruling the defendant's demurrer and exceptions to the plaintiff's amended petition, on the grounds stated in said exceptions."

The exceptions referred to in the above assignment of error were:

First. "Because said amended petition is uncertain and indefinite, and does not state in what manner the said hernia of plaintiff was aggravated, or in what manner said pain and suffering was increased by the acts of plaintiff's said road and cars."

Second. "The said amendment shows no cause of action against this defendant."

Above exceptions overruled and bill of exceptions reserved.

The amended petition referred to was as follows:

"That he (plaintiff), at the time of the injury complained of in his original petition, December 25, 1874, was suffering with hernia;

that by reason of the insufficient and unskilful construction of said company's railway, and by reason of the negligent and unskilful manner in which said train was conducted by said company, the car upon which your petitioner was situated was thrown from the track in said Robertson county, Texas, on said 25th of December, 1874, and your petitioner so seriously injured and shocked, and said hernia so aggravated by reason thereof, as caused your petitioner great pain and anguish, and still causes petitioner great pain and anguish; that by reason of his injury as aforesaid by said company he is injured for life, wherefore he prays as in his original petition," etc.

The other assignments of error are sufficiently stated in the opinion.

The evidence and pleading relied on by appellant to maintain the objection made by it to the allowance over its objections of evidence of a femoral hernia, long after the alleged injury, is elaborately stated in the brief of appellant's counsel, and is as follows, to wit:

The plaintiff proved the existence of a femoral hernia over defendant's objections: First. That plaintiff's pleadings were not sufficient to authorize that character of proof. Second. That a femoral hernia was a distinct hernia from that under which plaintiff was suffering, as claimed in his pleadings.

Plaintiff's pleading set out that at the time of the accident he was suffering from hernia which was aggravated by the shock, etc. Plaintiff, as a witness, testified that the injury on railroad occurred in December, 1874. That he had hernia since 1862, and had been wearing a truss for it. Before the accident his hernia was in only one place, the left side, high up. He called no doctor to examine him for hernia after the accident and before suit was brought.

A. C. Sugart testified that he went to clerk for Shafer in 1873, and that he had hernia ever since he first knew him. Did not know whether any doctor attended plaintiff, after the accident, for hernia. Dr. Moran examined plaintiff in June or July, 1875, for hernia, while attending court, and found three distinct hernias on left side, one femoral hernia.

Dr. Fancher testified: That inguinal hernia is of two varieties, the direct and the indirect. The inguinal hernia is where some of the abdominal viscera protrude through the inguinal canal. At sixty years of age about one person in four have hernia. Femoral hernia is very uncommon with men. The exceeding great pain that supervenes on a femoral hernia demands at once the attendance of a physician, and death would result in from thirty-six to seventy-two hours if the strangulation was not relieved.

Dr. Morrison testified: That in an old case of hernia an injury like plaintiff describes might enlarge the old opening, but it is very improbable that a new one would be produced.

At the time of trial plaintiff was fifty-eight years old.

Dr. Jones testified: That he had been engaged in practice of surgery for twenty-five years; that he had examined plaintiff twice. That on the first examination he discovered two ruptures in the inguinal region, and did not discover a femoral rupture. That last night he examined the plaintiff again, and more carefully, and found a femoral rupture.

Dr. Morrison testified: That last court plaintiff requested him to examine him in order to testify as to injuries received on railroad. That he declined. One reason for so doing being, that he could not testify as to the injury being made by the railroad accident after such lapse of time.

Witness Strange testified: That he had known plaintiff for ten years; had hernia himself, and had talked with plaintiff about his. Heard him say when he lived in Navasota, several years ago, that he had hernia.

Davis, Beall & Kemp, for appellant.

I. The allegations of the amended petition do not state with sufficient certainty and particularity the nature and extent of the injuries caused by the acts of defendant to authorize the recovery of damages against the defendant. Moore *v.* Anderson, 30 Tex. 230; Sutton *v.* Page, 4 Tex. 146; 1 Chitty on Pleading, pp. 440, 458; Sedgwick on Damages, 731; Baldwin *v.* Western R. Corp., 4 Gray, 384.

II. Under the pleadings and evidence in this case, it was error for the court to charge the jury, as in the fourth instruction was done, that they might find exemplary damages. Hays *v.* H. G. N. R. R. Co., 46 Tex. 273; Ingram and Wife *v.* Linn, Adm'r, 4 Tex. 267; Milwaukee & St. Paul R. R. Co. *v.* Arms; McKeon *v.* Citizens' R. R. Co., 42 Mo. 80; Cook *v.* Ill. Central R. R. Co., 30 Iowa, 201; Moore *v.* Sanburne, 2 Mich. 519.

III. The declarations of the plaintiff after the accident relative to his injuries, not competent evidence unless a part of the res gestæ, since he was a competent witness under the statute. 1 Greenl. on Ev. 102; Reed *v.* New York Central R. R. Co., 45 N. Y. 574; Illinois Central R. R. Co. *v.* Sutton, 42 Ill. 438.

IV. The court erred in allowing the plaintiff to prove the existence of a femoral hernia long after the railroad accident, under his pleadings and evidence in this case. Mims *v.* Mitchell, 1 Tex. 443; Hall *v.* Jackson, 3 Tex. 309; Haas *v.* Choussard, 17 Tex. 589; Sedgwick on Damages, 68, 116, 117, 732; Hunter *v.* Stewart, 47 Maine, 419; Teagarden *v.* Hetfield, 11 Ind. 522.

W. H. Hamman, for appellee.

WALKER, COMMISSIONER.—The court did not err in overruling the defendant's demurrer and exceptions to the plaintiff's amended petition. The amended petition, which was filed before the adop-

tion of the "rules" now in force, did not have the effect to withdraw the original petition, nor to suppress or supplant any of its allegations, except so far as the amendment effected that purpose by legal construction of the matter which it introduced, directly or impliedly varying the allegations of the original petition.

This cause has been "advanced" under the "new rules;" the briefs of the counsel set forth the allegations of the amended petition, which consist of averments of certain facts stated to show special damage, viz., that at the time of the alleged injury the plaintiff was suffering from disease, which was aggravated thereby, causing him great pain continuously from that time forth, and producing an injury to him for life. The amendment assigns to this injury the same cause as that which his original petition complained of as a cause of action for general damages. The exception is, that the amended petition is uncertain and indefinite, and does not state in what manner the plaintiff's disease (hernia) was aggravated, or in what manner his pain and suffering was increased by the acts of the appellant's road and cars. Also, that the amendment shows no cause of action against the defendant.

The original and amended petition, considered in their due relation to each other, show a cause of action in favor of the plaintiff against the defendant; which proposition is not controverted under this assignment of error, and it is not essential that the amended petition should contain within itself, unaided by the original petition, a complete cause of action. The province of the amendment which was filed was to admit proof of special damage, and its sufficiency is to be tested by determining what degree of certainty is required in a petition in an action of trespass on the case for damages, in alleging special as distinguished from general damages. Conceding the rule of pleading applicable to the matter here involved to require, with us, as it does at common law, that the facts which constitute the special damage shall be stated specifically and circumstantially, as held in Sutton *v.* Page, 4 Tex. 142, we are of opinion that the amended petition sufficiently conforms to it. The facts were not indefinitely stated, nor does there exist any uncertainty as to the cause of the special damage complained of, nor the effect which it produced upon the plaintiff. It is neither necessary nor proper to set forth the evidence on which the pleader relies to sustain the facts which constitute his cause of action; and it was not a valid objection to the amended petition, that it did not "state in what manner the hernia of plaintiff was aggravated, or in what manner his pain and suffering was increased by the acts of the defendant's road and cars." The facts were alleged by the petition, that the plaintiff was wounded and injured by the wrongful acts of the defendant; it described his then diseased condition, and it alleged that by reason of the facts under which his injuries were received, that he was seriously shocked and

injured, and said hernia so aggravated by reason of those facts as caused him great pain and anguish, and alleged that they still cause great pain and anguish, and that he is injured for life. These facts are a distinct reply to the question as to the manner whereby the disease was aggravated, and the pain and suffering increased. The evidence of these facts consists in the circumstances in detail, if need be, to establish their existence. In view of the subject matter which the pleader set forth as the alleged special damage sustained, we think that the averments were sufficient. Wells *v.* Fairbanks, 5 Tex. 582; Van Alstyne *v.* Bertrand, 15 Tex. 177; Oliver *v.* Chapman, 15 Tex. 400.

The second assignment of error is that the court erred in its charges to the jury numbers one, two, three, four, five, six and seven. The charge given by the court consisted of several divisions of the subject, and one of them, number three, is subdivided and classified numerically into four sections. The general divisions of the charge were numbered from one to five inclusive; the subdivisions of the third division or section of the charge were also numbered from one to four inclusive. The defendant asked instructions to be given, likewise numbered from one to four inclusive. The fourth one of them was given; the others refused. The court replied in a writing to an inquiry by the jury after their retirement, whether a less number than twelve concurring jurors could return a verdict, by answering it in the negative.

Whether the error assigned is intended to reach all the charges and the instructions given, or, if not, which of them are aimed to be included, we cannot determine. If the assignment is intended to embrace all the charges and instructions given by the court, or certain ones of them only, in either case they will not be considered. Under the first-named alternative, the proposition of law would be, in effect, that the court erred in its charge, without any indication as to which of the several propositions contained in the charge was objected to. Under such an assignment, the court will not deem it necessary to revise the charge and instructions of the court, nor to reverse the judgment for errors in them, if such there should be, unless the justice of the case seem manifestly to require it. Hicks *v.* Bailey, 16 Tex. 233; Fisk *v.* Wilson, 15 Tex. 435. Applying this rule to this case, we shall not revise the charges which were given.

The fourth assignment complains that the court permitted a witness for the plaintiff, over the defendant's objection that it was hearsay and not a part of the res gestæ, to state "that the plaintiff used often to say after the accident, 'I must lie down, my rupture hurts me.'" This evidence was admissible as original evidence tending to show the bodily condition of the plaintiff at the time that he made use of the expressions of pain and suffering. Whether they were real or feigned was for the jury to determine. It was a

material issue in the case whether the plaintiff's disease was increased or aggravated after the occurrence of the alleged injury, and the inquiry concerning his condition after the accident was pertinent, and the facts concerning it might be established by such evidence as was offered. As respects the incident or circumstance, of his suffering from the disease at the time referred to by the witness, it was a part of the res gestæ; it was not the less admissible because it was not a part of the transaction which occasioned the injury to his person on the defendant's railway. 1 Greenl. Ev., sec. 102.

The appellant assigns as error, also, that the plaintiff was permitted to prove the existence of a femoral hernia long after the railway accident, under his pleadings and evidence. It was in issue, under the pleadings, that the hernia under which the plaintiff suffered at the time of the accident, was aggravated in consequence of his injuries. It was relevant under it for him to show, by evidence, the various features and sequences that succeeded in the nature and subsequent manifestations of his disease, and it was for the jury to determine from the evidence whether the femoral hernia referred to was associated with the original complaint, and an aggravation thereof. It was a question of science to determine the relation of the two diseases, if they were distinct, and it was competent for the plaintiff to show, if he could, whatever features of hernia were developed upon his system, which might be traceable to the injury he had sustained by the accident.

The evidence is sufficient to sustain the verdict of the jury, and it is not deemed essential to consider further the only remaining assignment, that the verdict is contrary to the law and the evidence.

We are of the opinion that the judgment ought to be affirmed.

Affirmed.

JOHN T. AIGEN,

v.

BOSTON AND MAINE R. R. CO.

(*Advance Case, Massachusetts. March* 29, 1882.)

Where freight is carried over connecting railroads, each road is liable for loss or injury accruing through its own negligence, even although the first carrier may also by express contract have assumed a responsibility for losses occurring on the lines of succeeding carriers.

THIS was an action to recover damages for injury to two horses, which with three others were transported from Waterville, Me., to Boston, over the Maine Central and the defendant railways. The

Maine Central Co. took pay for their transportation over the whole line, and gave the plaintiff a receipt and way bill for the entire distance, a copy of which is annexed. The plaintiff's writ contained counts in tort and contract.

There was evidence tending to show that four of the horses, including the two injured, were backed into the rear end of the car at Waterville; that a joist was put across in front of them, to which they were tied by their halters; and that a stay rope, fastened underneath their throats and to the sides of the car, secured them from biting and kicking, and kept them up in their places. That they were carried at about 11 o'clock A.M., and reached Portland at about 7 P.M. of the same day, and were then and there delivered to the defendant corporation in good order, without injury, and without any change in their halters or the stay rope. That they were delayed at Portland by the defendant twenty-four hours, and were not taken out of the car, nor watered, nor fed, till the next morning, when they were taken to Jewell's stable. That when they were put back in the car by the defendant's servants, they were unskilfully fastened, and the said stay rope was omitted, and the said injuries were the direct consequence of defendant's unskilfulness and negligence. There was conflicting evidence upon the preceding points, and also as to the condition of the horses and their fastenings when they were set upon the track of the defendant corporation in Portland.

Lorenzo D. Miller, witness and watchman for defendant, testified that at nine o'clock of the night of their arrival at Portland, and while the car containing said horses had been moved about a mile from the point of transfer between the tracks of the two corporations on to the track of the defendant, he looked into the car and found the stay rope gone, and one of the horses backed back five or six feet with halter untied; and that afterwards, when they had run the said car down to the freight house, he and a policeman tied the said halter, and that the horses were then scarred and bruised up some, and that they were left in the car over night without further care.

For the purpose of showing that said defendant corporation would be liable if the injuries resulted from the negligence of either, the plaintiff offered in evidence the contract between the defendant corporation and the Maine Central R. R. Co., the material part of which is annexed, and asked the court to rule that the defendant corporation would be liable if the horses were injured by the want of care of either of the two corporations, or upon either of their roads; but the court declined so to rule, and excluded the evidence, and the plaintiff took exception both to said refusal and to said ruling.

The plaintiff also asked the court to instruct the jury as follows:

(1.) That if the jury are satisfied that the horses were injured at the time the car was set off on the transfer track of the Boston and Maine R. R., and delivered to them, and by the Boston and Maine R. R. unloaded, and the horses temporarily stabled, and then reshipped in such damaged condition without notification to the consignor thereof, such would constitute negligence on the part of the Boston and Maine R. R.; and if it contributed to or aggravated the injuries, the Boston and Maine R. R. would be liable therefor.

(2.) If the jury are satisfied that the horses arrived in Portland, whether in a damaged or uninjured condition, and were allowed by the defendant to remain over night without care, feeding or unloading, this would constitute negligence on the part of defendant.

The court ruled that whether such acts constituted negligence was for the jury, refused to give the instructions prayed for, and submitted the question of negligence to the jury; and to this ruling and refusal to rule the plaintiff excepted. The verdict was for the defendant.

The following is the substance of the contract of carriage between the Boston and Maine R. R. Co. and the Maine Central R. R. Co.:

Said parties, in order, so far as possible, to promote the public interest and their own, by providing for the public accommodation at the least expense, do each, in consideration thereof and of the execution of this indenture by the other, agree with each other as follows:

ARTICLE 1. Each corporation hereby agrees with the other to connect the rails of one corporation with the rails of the other corporation . . . at their joint expense in the city of Portland . . . and . . . to make any other connection of their tracks in the future which the connecting business may require.

ART. 2. For the purpose of defining and determining what shall be understood by the term "connecting business" and by the term "pro rata" wherever either or both said terms shall appear in this contract, it is hereby agreed between said parties that connecting business shall mean all business coming from the road of one party on to the road of the other party. . . . By the term "pro rata," whenever the same occurs in this contract it shall be understood to mean such a division of the through rate for both passengers and merchandise as shall give to each of the parties hereto such a sum of money as the distance either of said parties transports said passengers or merchandise on its own road or branches, bears to the whole distance said passengers and merchandise shall be carried on or over the roads of both the parties hereto.

ART. 3. Each party hereto upon its respective road, and upon any it may control and operate, over which any of the connecting business referred to in this contract is transported, shall furnish suitable depot accommodations for said business, shall furnish and

sell all tickets and check all baggage for passengers going from any point on the road of one party to any point on the road of the other party, and all such tickets furnished and sold by the party of the first part shall be good over the Boston and Maine R. R. or over the Eastern R. R., to all points reached by both said Boston and Maine and Eastern R. Rs., and no other than tickets thus marked and designated shall be sold by the party of the first part to any point of competition, or reached by said Boston and Maine and Eastern R. Rs.; shall receive, load and waybill all goods and merchandise offered for transportation, and collect all charges thereon and do all things necessary at their respective depots that may be required for the proper transaction of said business; and said first party shall allow the business in both passengers and freight coming from the road of the first party to pass over either of the roads leading from Portland to Boston, or other points of competition common to said last-named roads, and all such business of both passengers and freight shall be left free to take either line west of Portland without influence from the first party herein named.

ART. 4. The rates of transporting all connecting business referred to in this contract shall be established and fixed from time to time by the party of the first part; provided, however, that when it is necessary to carry freight at a less rate than is provided for in this contract in order to secure it, the discount or reduction shall be borne by the parties hereto pro rata, and the parties hereto shall fix the rates, from time to time, for such freight.

ART. 5. Through trains for passengers shall be run between Boston and Portland with despatch, and in such numbers and at such hours as will best accommodate the connecting business in passengers, and the same in regard to merchandise. The passenger cars run for the connecting business shall be in all respects first-class, suitable cars for the connecting business in goods and merchandise shall be run through from one road on to the other, and the party owning such merchandise cars shall be paid for their use in the connecting business on the road of the other party, at the rate of one and one half cents per mile, for the distance run. Merchandise cars of the party of the first part, sent loaded to Boston and other points upon the road of the party of the second part, shall be loaded with goods and property in return when offered for transportation.

ART. 6. For every connecting passenger transported by the party of the second part between Boston, Charlestown, Somerville or Malden, and Portland, said party of the second part shall receive out of the through price of carriage the sum of one dollar and fifty cents, which shall be in full for all services and depot accommodations connected with said carriage, and the party of the first part shall receive the balance of said through price. For every connecting passenger between any station other than Boston, Charlestown,

Somerville or Malden, and Portland, the through price of carriage shall be divided pro rata between the parties hereto. For every ton of connecting goods and property transported between Boston, Charlestown, Somerville or Malden, and Portland, the party of the second part out of the through price shall receive two dollars, which shall be in full for all services connected with such carriage; and for every ton of connecting goods or property carried between any other stations than Boston, Charlestown, Somerville or Malden, and Portland, the party of the second part shall receive a pro rata share of the through price, and the balance shall belong to the party of the first part.

ART. 7. The parties hereto bind themselves, each to the other, promptly and with no unnecessary delay to return the merchandise cars received from each other when coming upon their roads respectively in the transportation of the connecting business, and to see that such cars suffer no injury from careless or improper usage. Should the merchandise cars received from one of the parties hereto be detained on the road of the other party for more than five days at one time, the party thus detaining them shall pay for such detention at the rate of one dollar and fifty cents a day for every day in excess of five days; but neither party shall be holden responsible for the cars of the other which may be consigned to stations on roads which are not named in this contract. The cars of each party hereto to be returned in like order as received, ordinary wear and tear excepted.

ART. 8. All injuries to persons, or loss of, or damage to, baggage or goods and property embraced in the joint business shall be paid for by the party on whose road it may occur; and when the loss or damage cannot be traced to either of the parties hereto, then it shall be paid for by each in the proportion it shares in the through price of carriage.

ART. 9. . . . Accounts shall be kept by the parties of said connecting business, and returns thereof made each to the other, and once in each month these accounts shall be settled, and the balance due to one party from the other paid once a month.

ART. 10. The party of the first part hereby agrees to use its influence to protect the rates of the party of the second part, and in no event whatever will it permit any other person or persons, corporation or corporations, transportation company or companies, to transport either persons or property, passengers or merchandise, in either direction, on or over any part of the road of said first party, at any less rates for said passengers or merchandise than it charges said second party for carrying the passengers and merchandise of said second party. And the party of the second part hereby agrees to make the rates for passengers and merchandise from all points competing with the party of the first part, whether the same be by land or water, as low as said second party makes or names to any other

party, corporation or transportation company; that is to say, said second party shall in no event whatever name a rate from any point on the line of the first party to any point on the line of the second party to any other or third party at less than the rate named between the same points by said first party, it being the intent and meaning of the parties hereto to protect each other in all rates of fare and freight, so far as they legally can. It is further agreed that neither party hereto will carry freight or passengers in connection with any other party between competing points at rates that will enable any other party to carry at a less price than the parties hereto carry freight or passengers between said competing points.

(Form F, 32.) Waterville, Oct. 6, 1877.

Mr. John Hagan [Aigen] to Maine Central R. R. Co., Dr.

(No. W. B.)

(Pro. No.)

For transportation from Waterville to Boston:—

	Weight.	Rate.	Freight.	Expenses.	Total.
Five horses.	9,500.		$30.00.		

Number and initial of car, M. C. 1052.

Received payment for the company.

(Stamped) E. C. Lowe, Oct. 6.

Paid freight agent Maine Central R. R., Waterville, Me.

Agent.

[On margin.] All goods and merchandise will be at the risk of the owners while in the storehouses of the company.

Allen, J.—1. The first ground of exception is to the exclusion of the contract between the defendant and the Maine Central R. R. Co., and the refusal of the presiding judge to rule that the defendant would be liable if the horses were injured by the want of care of either of the two corporations, or upon either of their roads.

Whether the contract was introduced in evidence or not, the defendant corporation would be liable for any loss or injury occurring through its own negligence. The English doctrine that, where there is one contract for carriage over several connecting roads, the first carrier is exclusively liable for losses over the whole route, has never prevailed here; and the doctrine here is well established that each carrier is responsible for the results of its own negligence, even although the first carrier may also by express contract have assumed a responsibility for losses occurring on the lines of succeeding carriers. Judson *v.* Western R. R., 4 Allen, 522–523. Even if, under the terms of the way-bill given in the present case, the Maine Central R. R. Co. assumed a responsibility for the safe carriage of the horses to Boston, the defendant would nevertheless be also responsible to the plaintiff if any injury occurred through

its negligence after the horses came to its possession. The verdict, therefore, must be deemed to establish conclusively that there was no negligence on the part of the defendant. The plaintiff, however, contended that, under the contract with the Maine Central R. R. Co., the defendant had assumed a liability to him beyond what the law would otherwise impose upon it; and the eighth article of the contract is specially relied on. But this contract creates no partnership between the two corporations. Burroughs *v.* Norwich and Worcester R. R., 100 Mass. 26; Washburn and Moen Manufacturing Co. *v.* Providence and Worcester R. R., 113 Mass. 493, 494. The defendant is not responsible as a partner, therefore, on the special contract of the Maine Central R. R. Co. with the plaintiff. It was not the intention of article eight to give any new rights or remedies to third parties, but to furnish a rule for settling the rights of the parties to the contract as between themselves. If, for instance, the Maine Central R. R. Co., by virtue of a contract entered into by it for safe carriage of horses or other property over the whole route, and for their safe delivery in Boston, should be held responsible to the shipper for a loss occurring on the defendant's line, or a loss which could not be traced, this article would probably furnish the rule for adjusting the ultimate responsibility as between the two railroad companies. But whatever meaning the second clause of this article may have, as between the parties to the contract, the plaintiff is not a party to it and gets no additional rights under it as against this defendant. There is no priority of contract between him and the defendant, and even if it could be seen that the provision was designed for the benefit of persons situated like the plaintiff, this would not enable the plaintiff to maintain his action. Exchange Bank *v.* Rice, 107 Mass. 41. In whatever way the contract is looked at the defendant thereby assumed no duty or obligation to the plaintiff which can be enforced by an action at law.

2. The second and third exceptions rest on the ground that certain particular acts of the defendant, if proved, in and of themselves constituted negligence which would render the defendant liable. Where the burden rests upon the plaintiff to prove due care on his own part, it has been held as matter of law in several cases that upon undisputed facts he has failed to sustain this burden. Ordinarily, however, what constitutes a want of due care is a question for the jury. Especially is this so when a defendant's negligence is to be proved and the facts are in dispute. In such cases, as a rule, the court should not select certain facts, however significant, and instruct the jury that these, if proved, constitute negligence; but should leave the question to the jury upon all the evidence, relying upon their giving the proper weight and significance to the particular facts. Williams *v.* Grealy, 112 Mass. 79. So in the present case, the facts assumed in the requests for in-

structions, although significant and having a strong tendency, if proved, to show negligence, were not such as to make it the duty of the court to rule that as matter of law they constituted negligence. All these facts might exist, consistently with other facts or explanations which would warrant a jury in negativing the existence of negligence.

Exceptions overruled.

See note to St. Louis Ins. Co. *v.* St. Louis, etc., R. R. Co., 3 Am. and Eng. R. R. Cas. 271; Watkins *v.* Terre Haute, etc., R. R. Co., 1 Am. and Eng. R. R. Cas. 614.

HALLIDAY et al., Appellants,

v.

THE ST. LOUIS, KANSAS CITY AND NORTHERN RY. CO.

(74 *Missouri Reports*, 159. *October Term*, 1881.)

Where the contract of a common carrier contemplates the employment of a connecting carrier to complete the transportation, the mere reception of the property by the latter will create sufficient privity between it and the shipper to enable him to maintain an action against it on the contract, and in such case the conneting carrier will be entitled to the benefit of all valid limitations upon the carrier's liability provided in the contract; but in order to avail itself of them, they must be specially pleaded.

APPEAL from Moberly Court of Common Pleas.—Hon. G. H. BUCKHARTT, Judge.

Reversed.

W. T. McCanne for appellants.

It would have been a misjoinder to have made either the M., K. and T. Ry. Co., or its receiver, a party to this action. Hoagland *v.* R. R. Co., 39 Mo. 451. The receiver was only liable over his own line of road. Coates *v.* Express Co., 45 Mo. 238. The defendant was liable both generally as a common carrier and under the terms of the special contract made with the first carrier. 39 Mo. 451; 45 Mo. 238; Cramer *v.* Express Co., 56 Mo. 524; Snider *v.* Express Co., 63 Mo. 377; Rice *v.* K. P. R. R. Co., 63 Mo. 314.

Wells H. Blodgett and Geo. S. Grover for respondent.

There was no privity of contract between the plaintiffs and the defendant in this case. The plaintiffs had no contract with the defendant. The only contract made was with the first carrier, who undertook the whole duty of transporting the live stock from the starting point to its destination, and who collected all the freight charges therefor. Defendant was simply an agent or auxiliary of the first carrier, not a partner, and the plaintiffs' action, if they had any, was against the carrier with whom their contract was made.

They proved no cause of action against defendant, and for this reason the instruction in the nature of a demurrer to the evidence was properly given. Coates *v.* Express Co., 45 Mo. 241; Gray *v.* Jackson, 51 N. H. 9; s. c., 12 Am. Rep. 1; Ill. Cen. R. R. Co. *v.* Frankenburg, 54 Ill. 88; Milwaukee R. R. Co. *v.* Smith, 74 Ill. 197; Mulligan *v.* R. R. Co., 36 Iowa, 181; s. c., 14 Am. Rep. 514. Plaintiffs are not entitled to recover, because they failed to give notice of their claim for damages, as required by the special contract. It was not proven that notice of any claim whatever was given by them to either carrier. Such stipulations as to notice are reasonable, and the courts will enforce them. Rice *v.* K. P. Ry. Co., 63 Mo. 319; Express Co. *v.* Caldwell, 21 Wall. 264; Goggin *v.* K. P. Ry. Co., 12 Kas. 41.

HOUGH, J.—It is alleged in substance in the petition in this case, that on the 30th day of December, 1875, the plaintiffs delivered to Wm. Bond, receiver of the Missouri, Kansas and Texas Ry. Co., at Madison Station, in the county of Monroe, eighteen horses and mules, loaded in a freight car belonging to the defendant, which said receiver, for a certain sum paid to him by plaintiffs, contracted in writing to transport to the city of St. Louis; that by the terms of said agreement, said receiver had the right to transport said car of horses and mules over any other connecting railroad to the city of St. Louis, and that by the terms of said agreement said receiver was to be released from all liability for said stock after its delivery to such connecting line; that said car of stock was transported by said receiver over the Missouri, Kansas and Texas Ry. to Moberly, and there delivered to the defendant to be by it transported to the city of St. Louis; that when said car was so delivered to the defendant the stock therein were in good condition and uninjured: that the slats on the side of the car of defendant in which said stock was loaded were negligently placed thereon so far apart that a bay mare which was in said car got her hind foot fastened between the same while on defendant's road between Moberly and St. Louis, and was thereby permanently injured to plaintiffs' damage in the sum of $75. The petition then proceeds to charge the defendant, as a common carrier, with a breach of duty in failing to provide a good and sufficient car for the transportation of said stock. The answer of defendant was a general denial only.

At the trial the contract between the plaintiffs and Bond, the receiver, was introduced in evidence by the plaintiffs. This contract bound the receiver to transport the stock to the city of St. Louis, and contained the following stipulations: "And said party of the second part (the plaintiffs) hereby accepts for such transportation the cars provided by said receiver and used for the shipment of said stock, and hereby assumes all risk of injury which the ani-

mals, or either of them, may receive in consequence of any of them being wild, unruly or weak, or maiming each other or themselves, or in consequence of heat or suffocation, or other ill-effects of being crowded in the cars. . . . or of loss or damage from any other cause or thing not resulting from the wilful negligence of the agent of the party of the first part. . . . Said party of the second part further agrees that, as a condition precedent to his right to recover any damages for any loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before said stock is mingled with other stock." It appeared from the testimony that the live stock in question arrived in Moberly, Missouri, on the 30th day of December, 1875, in good condition, and was there transferred by William Bond, as receiver, to the defendant, who transported it to St. Louis for him, in pursuance of his contract with the plaintiffs. No contract was entered into between the plaintiffs and the defendant. The stock arrived in St. Louis on the morning of the next day, and was all in good condition, except the mare mentioned in the petition. She was found with one of her hind feet fastened between the slats of that car, and the slats had to be cut out in order to set her free. This injury loosened her hoof and rendered her lame, and injured her in value to the amount of $75. No notice of this injury was given by the plaintiffs, as provided in the contract, to the officers or agents of William Bond, the receiver, or to the defendant. At the close of the plaintiffs' case, the defendant demurred to the evidence, and the demurrer was sustained and judgment rendered for the defendant.

The court erred in sustaining the demurrer to the evidence. When a carrier undertakes to transport to a point beyond the terminus of its own line, or to a point not on its line, it will be responsible according to the terms of the contract of shipment, if it contain no prohibited exemptions, for loss or injury occurring upon the connecting lines as well as upon its own line, and the connecting carrier will also be responsible to the shipper for its own fault or negligence, and according to the terms of the shipper's contract with the contracting carrier. The connecting carrier by receiving the goods from the contracting carrier, becomes its agent for the purpose of completing its contract with the shipper, and where, as in this case, the contract of the shipper contemplates the employment of connecting lines, the law will imply from this circumstance sufficient privity between the shipper and the connecting carrier to enable the shipper to maintain an action against such carrier on the contract. Hutchinson on Carriers, § 150. As the contract of the plaintiffs with the receiver was for the entire route, he could not stipulate

for exemption from all liability beyond the terminus of his line. Cinn. R. R. Co. *v.* Pontius, 19 Ohio St. 221; s. c. 2 Am. Rep. 391. Condict *v.* Grand Trunk R. R. Co., 54 N. Y. 500. By simply accepting the stock from the receiver, Bond, to be transported to St. Louis, the defendant became entitled to claim the benefits of all valid exceptions he had made with the shipper. Lawson on Carriers, § 243. But in order to avail itself of them at the trial it was necessary that it should have set them up in its answer. Oxley *v.* St. Louis, K. C. & N. Ry. Co., 65 Mo. 629; Clark *v.* St. Louis, K. C. & N. Ry. Co., 64 Mo. 447. The judgment will, therefore, be reversed and the cause remanded. All concur.

THE ST. LOUIS AND IRON MOUNTAIN R. R. Co.

v.

RUSSEL M. LARNED.

(*Advance case, Illinois. June* 21, 1882.)

While it is true that a railroad carrier may by contract restrict its liability to its own line, there is no doubt that it may also extend its liability beyond its own line.

So, where a railroad company in its own wrong shipped a lot of cotton from its depot in Arkansas, to Waterville, in the State of Maine, beyond the terminus of its road, and on the application of the agent purchasing the cotton, gave him a bill of lading containing a printed stipulation restricting its liability to its own line of road, naming the number of bales, and containing this entry, written in a blank: "To be forwarded from Waterville, Maine, (where the cotton is now lying,) at consignee's expense. All charges for transportation to that point, and necessary charges, to be paid by him,"—and the oral evidence showed it was to be transported to Putnam, Connecticut, it was *held*, that the company was liable to the assignee of the bill of lading, the consignee, for the value of the cotton, on account of its non-delivery at Putnam.

An agent for eastern parties bought cotton in Arkansas, which he left at the defendant's railroad depot, taking receipts for the same, but gave no orders for its shipment, and the railroad company, without any authority from such agent, shipped the same to Waterville, Maine, where another company—the Maine Central R. R. Co.—delivered the same to a person who was not in fact entitled to it. On learning the facts the defendant railroad gave a bill of lading, agreeing to transport the cotton to the person who was entitled to it, in Connecticut, at the consignee's cost and expense, which was not done, the person receiving the cotton refusing to give it up, claiming it was bought for him. The agent drew a draft on his principal, to which he attached the bill of lading, properly assigned, which was paid by the principal, and the latter brought suit against the defendant railroad for the value of the cotton, and recovered. It was contended that the consignee should have sued the Maine Central R. R., and not the defendant. *Held*, that while he might have waived the defendant's contract, and have sued the other company for a conversion, or the person receiving the cotton, he was under no obligation to do so, and that the recovery against the defendant was warranted.

While it may be that property in the adverse possession of another is not transferable so as to pass the title, yet where a railroad company gives a bill of lading reciting that the property is then lying in a depot at a certain place, and agrees to forward the same to the consignee, and others advance money on the faith of such bill of lading, which is assigned by the shipper, the railroad company will be estopped, as against such persons, from showing that at the time of giving such bill of lading, and its indorsement, the goods were in the adverse possession of another person, so as to defeat an action brought by the consignee so advancing money on the bill of lading.

APPEAL from the Appellate Court for the First District:—heard in that court on appeal from the Superior Court of Cook County; the Hon. Sidney Smith, Judge, presiding.

Mr. Charles H. Wood, for the appellant.

Mr. E. C. Larned and Mr. A. M. Pence, for the appellee.

Mr. JUSTICE WALKER delivered the opinion of the court:

It appears that one G. T. Potter, in the years 1879 and 1880, was engaged in Arkansas in the purchase of cotton for Lockwood & Co., of Waterville, in Maine, and appellee, of Providence, Rhode Island, and other eastern manufacturers. They furnished him money, and he purchased the cotton and delivered it to appellant, at its depot in Texarkana, when receipts or tickets were given to him as each separate lot was delivered. When he wished to make a shipment he returned the tickets, and a bill of lading was given him. He thereupon drew on the consignee for the value of the cotton thus shipped, and attached the bill of lading and obtained the money on the draft. In this manner he raised money to pay for the cotton he purchased. Having cotton in the depot for which he held tickets, the freight agent by mistake shipped fifty bales to Waterville, which were intended to be shipped to Larned, at Providence. When Potter came to ship it to Larned he heard of the mistake, but being informed that it was still at Waterville, it was agreed that the railroad company would have it reshipped to Putnam, Connecticut. Thereupon the railroad company gave Potter a through bill of lading, using an ordinary printed blank, with all of the terms and conditions, but writing in the undertaking to so deliver it. This bill of lading was assigned to Larned, attached to a draft drawn on him and sent forward, and the draft was paid. The railroad company failed to make delivery. Larned was informed the cotton was at Waterville, but on inquiry it was found that the last carrier, the Maine Central R. R. Co., had delivered it to Lockwood & Co. On demand they refused to deliver it to Larned, and he sued appellant for a failure to deliver according to the terms of its bill of lading. A trial was had in the Superior Court of Cook County, resulting in a verdict and judgment in favor of plaintiff. The case was removed to the Appellate Court, the judgment was affirmed, and defendant appeals to the court.

It is urged that railroads may, by express contract, limit their

liability to loss on their own road, and against loss occurring beyond the terminus of their own line, and that the bill of lading in this case contained a restriction of that kind. Admitting this bill of lading does contain such a stipulation, after naming the number of bales of cotton shipped, it contains this: "To be forwarded from Waterville, Maine (where the cotton is now lying), at consignee's expense. All charges for transportation to that point, and necessary charges, also to be paid by him." This was written in a blank in the bill of lading. While it is true that a railroad carrier may restrict its liability to its own line, it cannot be denied that it may extend its liability beyond its own line. It in this case did in terms agree to forward the cotton from Waterville, and the oral evidence shows it was to Putnam, Connecticut. The company thereby undertook to transport this cotton from Waterville to Putnam. It is no answer to say the cotton was not there. It had been put in their depot and custody to be held for shipment, and they, of their own wrong, and without authority or orders from the holders of their receipts, had sent it to Waterville, and they were bound to return it to Potter, at Texarkana, or respond in damages, had he demanded it. But he waived that right, and agreed that they might deliver it at Putnam, and this they undertook to do by this contract, and the company was bound to perform the undertaking.

It is urged that the suit should have been against the Maine Central R. R. Co. If an action would lie against it for a wrong delivery, it is in favor of appellant. Potter did not place the cotton in its possession, nor did he authorize or direct it to be done. It was placed in its possession by appellant, of its own wrong. Then why require Potter or his assignee to sue that company? It may be that he might, if he chose, have waived the contract of appellant, and sued that company for a conversion of the property, but he was under no obligation to do so. The same is true as to suing Lockwood & Co., as neither he nor his assignee placed the cotton in their hands.

It is claimed that the assignment of the bill of lading did not transfer the title, because it was in the adverse possession of Lockwood & Co., who claimed to own it at the time the assignment was indorsed. Concede this to be true under ordinary circumstances, appellant is estopped to deny that the cotton was at Waterville. The company say in its bill of lading that the cotton is lying at that place, and the bank who received the bill of lading with the assignment, and advanced the money on it, we may presume, would not have done so had it known this statement was untrue, and the cotton was in the possession of an adverse claimant, and could only be recovered at the end of a lawsuit. It was by this statement of appellant that each successive assignee was induced to advance money on it, and it would be a fraud on them to

permit appellant to escape liability by showing that this statement on which they acted was untrue. It presents a clear case requiring the application of an estoppel. It is in the fullest sense an estoppel upon appellant.

It is insisted that the damages were assessed too high. If it were conceded that the finding and assessment of damages is not the finding of a fact which has been found the same way by the Appellate Court, and we can look into the evidence to determine the correctness of the finding, the evidence clearly sustains it. This being true, there is no force in this position.

Perceiving no error in this record, the judgment of the Appellate Court must be affirmed.

Judgment affirmed.

A carrier may contract to carry goods to a destination beyond his own line, and in such a case each and all connecting carriers become his agents, for whom he is responsible to the shipper. Wilby *v.* West Cornwall Ry. Co., 2 H. & N. 703; Blake *v.* Great Western Ry. Co., 7 H. & N. 987; Coxon *v.* Great Western Ry. Co., 5 H. & N. 274; Le Conteur *v.* London, etc., Ry. Co., 1 L. R. Q. B. 54; Murchamp *v.* Lancaster, etc., Ry. Co., 8 M. & W. 421; Quimby *v.* Vanderbilt, 17 N. Y. 306; Bissell *v.* Michigan, etc., R. R. Co., 22 N. Y. 258; Burtis *v.* Buffalo, etc., R. R. Co., 24 N. Y. 269; Williams *v.* Vanderbilt, 28 N. Y. 217; Roberts *v.* Van Buskirk, 31 N. Y. 661; Buffit *v.* Troy, etc., R. R. Co., 40 N. Y. 168; Root *v.* Great Western R. R. Co., 45 N. Y. 524; Railroad Co. *v.* Trans. Co., 16 Wall. 324; Evansville, etc., R. R. Co. *v.* Androscoggin Mills, 22 Wall. 594; Railroad *v.* McCarthy, 6 Otto, 258; Steamboat Co. *v.* Brown, 54 Pa. St. 77; Pennsylvania R. R. Co. *v.* Berry, 68 Pa. St. 272; Feital *v.* Middlesex R. R. Co., 109 Mass. 398; Hill Manuf. Co. *v.* Boston, etc., R. R. Co., 104 Mass. 122; McCuer *v.* Manchester, etc., R. R. Co., 13 Gray, 124; Najac *v.* Boston, etc., R. R. Co., 7 Allen, 329; Illinois, etc., R. R. Co. *v.* Copeland, 24 Ill. 332; Illinois, etc., R. R. Co. *v.* Johnson, 34 Ill. 389; Southern Ex. Co. *v.* Shea, 38 Ga. 519; Peet *v.* Railroad, 19 Wis. 118; Wahl *v.* Holt, 26 Wis. 703; Candee *v.* Penna. R. R. Co., 21 Wis. 589; Perkins *v.* Portland, etc., R. R., 47 Me. 573; Noyes *v.* Rutland, etc., R. R. Co., 27 Vt. 110; Morse *v.* Brainerd, 41 Vt. 550; Newell *v.* Smith, 49 Vt. 255; St. Louis, etc., R. R. Co. *v.* Piper, 13 Kan. 505; East Tennessee, etc., R. R. Co. *v.* Nelson, 1 Cold. 276; Angle *v.* Mississippi, etc., R. R. Co., 9 Iowa, 488; Wheeler *v.* San Francisco, etc., R. R. Co., 31 Cal. 46; Nashua Lock Co. *v.* Worcester, etc., R. R. Co., 48 N. H. 339; Cincinnati, etc., R. R. Co. *v.* Pontius, 19 Ohio St. 221; Kyle *v.* Laurens R. R. Co., 10 Rich. (S. Car.) 382; compare Hood *v.* N. Y., etc., R. R. Co., 22 Conn. 502; Converse *v.* N. Y. etc., Trans. Co., 33 Conn. 166.

In England the rule is well settled that if a carrier merely accepts goods to be forwarded to a destination beyond his own line, he becomes exclusively liable to the shipper for the safe arrival of the goods, notwithstanding he has made no contract for through carriage with the shipper. Scothorn *v.* South Staffordshire Ry. Co., 8 Exch. 341; Crouch *v.* Great Western Ry. Co., 2 H. & N. 491; Wilby *v.* West Cornwall Ry. Co., 2 H. & N. 703. But in this country this rule has met with but limited acceptance. In a portion of the States it has been approved and followed. Bennett *v.* Filyaw, 1 Fla. 403; Mosher *v.* Southern Ex. Co., 38 Ga. 37; Cohen *v.* Southern Ex. Co., 45 Ga. 148; Southern Ex. Co. *v.* Shea, 38 Ga. 519; Angle *v.* Mississippi, etc., R. R. Co., 9 Iowa, 487; Mulligan *v.* Illinois, etc., R. R. Co., 36 Iowa, 181; Illinois, etc., R. R. Co. *v.* Copeland, 24 Ill. 332; Illinois, etc., R. R. Co. *v.* Cowles,

33 Ill. 116; Illinois, etc., R. R. Co. v. Johnson, 34 Ill. 389; Illinois, etc., R. R. Co. v. Frankenburg, 54 Ill. 88; Chicago, etc., R. R. Co. v. People, 56 Ill. 365; Chicago, etc., R. R. Co. v. Montfort, 60 Ill. 175; U. S. Ex. Co. v. Haines, 67 Ill. 137; Field v. Chicago, etc., R. R. Co., 71 Ill. 458; Adams Ex. Co. v. Wilson, 81 Ill. 339; Milwaukee, etc., R. R. Co. v. Smith, 84 Ill. 239; Lock Co. v. Railroad, 48 N. H. 339; Gray v. Jackson, 51 N. H. 9; Western, etc., R. R. Co. v. McElwee, 6 Heisk, 208; East Tennessee, etc., R. R. Co. v. Rogers, 6 Heisk, 143; Louisville, etc., R. R. Co. v. Campbell, 7 Heisk, 253; Carter v. Hough, 4 Sneed, 203; East Tennessee, etc., R. R. Co. v. Nelson, 1 Coldw. 272; Bradford v. Railroad, 7 Rich. 201; Kyle v. Railroad, 10 Rich. 382. In other States it has been held that the carrier, in the absence of a special contract, is only bound to carry the goods safely to the terminus of his own road, and his liability is ended when he delivers the goods to the next succeeding carrier. St. John v. Van Santvoord, 25 Wend. 660, 6 Hill, 157; Root v. Great Western R. R. Co., 45 N. Y. 524; Lamb v. Camden, etc., R. R. Co., 46 N. Y. 271; Reed v. U. S. Ex. Co., 48 N. Y. 462; Babcock v. Lake Shore, etc., R. R. Co., 49 N. Y. 491; Condict v. Grand Trunk R. R. Co., 59 N. Y. 500; Camden, etc., R. R. Co. v. Forsyth, 61 Pa. St. 81; Nutting v. Connecticut, etc., R. R. Co., 1 Gray, 502; Darling v. Boston, etc., R. R. Co., 11 Allen, 295; Burroughs v. Norwich, etc., R. R. Co., 100 Mass. 26; Farmers', etc., Bank v. Champlain Trans. Co., 16 Vt. 52; Brintnall v. Saratoga, etc., R. R. Co., 32 Vt. 665; Cutts v. Brainerd, 42 Vt. 566; Perkins v. Portland, etc., R. R. Co., 47 Me. 573; Skinner v. Hall, 60 Me. 477; Inhabitants v. Hall, 61 Me. 517; Hood v. N. Y., etc., R. R. Co., 22 Conn. 502; Elmore v. Naugatuck R. R. Co., 23 Conn. 457; Converse v. Norwich, etc., R. R. Co., 33 Conn. 166; Baltimore, etc., R. R. Co. v. Schumacher, 29 Md. 168; McMillan v. Michigan, etc., R. R. Co., 16 Mich. 79; Phillips v. North Carolina R. R. Co., 78 N. C. 294; Railroad v. Pratt, 22 Wall. 123; Railroad v. Manuf. Co., 16 Wall. 318; Crawford v. Southern R. R. Assn., 51 Miss. 222; Irish v. Milwaukee, etc., R. R. Co., 19 Minn. 376.

The carrier may, however, be held liable for loss or damage to the goods when in custody of succeeding carriers if he enters into a contract with the shipper to transport the goods to their destination. A contract of this nature need not be special, but may be inferred from the circumstances attending the shipment, such as the receipt of the freight charges for the entire distance, a through bill of lading or receipt, a partnership or arrangement between connecting lines to pro rate the freight receipts and losses, or the custom of the carrier to forward goods through to their destination. Reed v. Saratoga, etc., R. R. Co., 19 Wind. 534; Berg v. Narragansett Co., 5 Daly, 394; Quimby v. Vanderbilt, 17 N. Y. 306; Evansville, etc., R. R. Co. v. Androscoggin Mills, 22 Wall. 594; Railroad v. Pratt, 22 Wall. 123; Gass v. New York, etc., Co., 99 Mass. 220; Hill Manuf. Co. v. Boston, etc., R. R. Co., 104 Mass. 122; Candee v. Pennsylvania R. R. Co., 21 Wis. 582; Robinson v. Merchants' Dispatch Co., 45 Iowa, 470; St. John v. Express Co., 1 Woods, 612; Root v. Great Western R. R. Co., 45 N. Y. 524; Wilson v. Chesapeake, etc., R. R. Co., 21 Gratt. 654; Ellsworth v. Tartt, 26 Ala. 733; Montgomery v. Moore, 51 Ala. 394; Cincinnati, etc., R. R. Co. v. Spratt, 2 Duval, 4; Gray v. Jackson, 51 N. H. 9; Woodward v. Railroad, 1 Biss. 403.

WOLFF
v.
CENTRAL R. R. Co.

(*Advance Case, Georgia. February*, 1882.)

Section 2084 of the Code providing that the last of a connecting line of railroads over which goods are shipped which receive them as in good order is liable to the consignee, does not apply to baggage of a passenger checked and accompanying him on his passage.

Where a passenger with a through ticket over a connecting line of railroads checks his baggage at the starting-point through to his destination, and upon arrival it is damaged, or has been broken open and robbed, he may sue the railroad which issued the check, or he may sue the road delivering the baggage in bad order.

That under the American authorities each of the roads composing such a continuous line over which a passenger travels on a through ticket, and baggage is sent on a through check, is a principal contractor, adopting the contract of the first road, and is therefore liable for spoliation of baggage, irrespective of the point at which it actually occurred.

Are such roads also jointly liable as partners or joint contractors?

THE plaintiff in error purchased a through ticket from New York to Macon, Ga., which ticket was the usual coupon-ticket, and included a coupon of the Central Railroad, upon which last coupon the plaintiff passed over the line of the Central Railroad with her baggage, which was received at Macon in apparently good order, but upon opening her trunk she found it had been robbed of clothing, etc., to the amount of $800. The trunk was checked through from New York to Macon by the same parties who sold the ticket. Proof was made of the ownership and loss of the articles after they were delivered to the officials in New York, and that they were usual and ordinary baggage. On closing plaintiff's testimony the court, on motion of defendant's counsel, awarded a non-suit; whereupon plaintiff excepted. Counsel for plaintiff in error insists that the rule of liability prescribed by § 2084 of Code against connecting roads and under different companies, where goods are to be transported over more than one road, includes baggage accompanying a passenger, which rule "makes the last company which has received the goods as in good order responsible to the consignee for any damages, open or concealed, done to the goods."

SPEER, J.—1. We cannot believe it was the intention of the Legislature to include the transportation of baggage under the term "goods." There is in the same chapter including that section, regulations touching the transportation of baggage that do not apply to goods. Section 2071 of that chapter declares "the com-

pany is responsible for baggage placed in their care." The next section provides for the checking of baggage, and imposes a penalty for failing to conform to the regulation touching the same. A lien is given to the company for the cost of transportation, which extends to the fare of the passenger. There are also limitations as to the liability of the company on the value of the baggage for the fare taken, which do not apply to goods. The distinction between goods and baggage is thus so clearly recognized by the context that we cannot construe section 2084 as being intended to include baggage under the term "goods." The rule of liability of a common carrier for baggage is well understood, but in the case of connecting roads, in the absence of proof as to where the loss occurred, which one is liable is now the question. Defendant insists that the company in New York who sold the through ticket is responsible, and so this court ruled in Hawley *v.* Screven, 62 Ga. 347, but did not rule that such road alone was liable. Is this the only one liable unless the act of spoliation is established as having occurred on a particular road? The plaintiff purchased a through ticket from New York to Macon by which the connecting roads contracted to transport her and her baggage. There is no evidence as to where the spoliation occurred. In the absence of positive statutory regulations as to the liability of connecting roads in the transportation of baggage when loss or damage to the same occurs, we find the English and American decisions are not in harmony. The English rule is, that the carrier who receives the goods and contracts to carry them over the entire route is liable, holding the intermediate carriers to be agents of the first road, and that there is no priority of contract between the agents and owner of the goods. The courts of this country do not recognize this doctrine, and we do not think it fair to our own citizens to send them to a foreign jurisdiction to seek redress if it can be avoided consistently with our rules of law. We conclude, from an examination of our own authorities, that the true rule in case of connecting roads for liability of baggage should be, that when two or more railroads are associated together, and form a continuous line for the transportation of passengers and baggage, giving to each the right to sell these through tickets with coupons over the several roads, and thus bargaining for the transportation of passengers over the whole line, and receiving the price of said tickets, the same to be divided among them at periodical settlements, the company so selling and contracting is the agent of the several companies composing such lines, rather than to regard the other companies as its agent in performing the service allotted to them. 9 Am. Rep. 474; 6 Ib. 434. The sale of such tickets is for the common benefit of all the companies, and the receipts from them are presumptively divided between them in proportion to service rendered by each, making them interested as principals and not as agents. In fact, they stand substantially in the position of

partners in such through business, and may be, perhaps, jointly as well as severally liable as such. There are numerous decisions that hold them as to this through business, jointly liable as partners through the entire route. Angell on Car. 93, and cases cited; Story on Bailm. 506, and cases cited; 11 Wend. 571; 19 Ib. 329; 7 Rich. (S. C.) 201; 4 Seld. 37; 11 Wend. 575. To hold these associated companies severally liable on these through contracts springs from the necessity of the rule. To remit the owner whose baggage has been lost or damaged, to the company where the loss or spoliation occurred, is simply to deny him all redress. For he has no means to ascertain the facts except at the pleasure of the company, who, it is to be presumed, will not be prompt to furnish evidence of their own negligence and liability. To drive the owner to a foreign jurisdiction for redress is not consistent with our public policy. To hold each company liable for negligence or loss incurred while transporting under one continuous and joint contract made with the owner, will interest all alike to be diligent, and if loss should occur, it is more equitable for the losses to be apportioned among them, as they apportion the profits of their joint enterprise, rather than that the loss should be borne alone by the owner. The contract for transportation is made with the joint continuous line; they act for each other and receive the fruits of the contract as common agents one for the other. The rule holding each liable in case of loss is founded in equal justice, and is far more equitable and convenient than the rule which holds that the company alone should be liable which sold the through ticket, and which may be as free from fault as any intermediate company.

JACKSON. C. J., concurring, stated that the exact point decided, and in which the entire court concurred, was the grant of the nonsuit on the ground of non-liability of the last road.

Judgment reversed.

See note, p. 439.

FRANK HADD,

v.

UNITED STATES AND CANADA EXPRESS COMPANY.

(52 *Vermont Reports*, 335.)

In the absence of special contract, a common carrier, receiving a parcel marked to a point beyond its route, but having no special business relationship with the carrier on the connecting line, is responsible, as such carrier, only for safe and seasonable delivery at the end of its own route to the carrier next in the line of transportation.

In case for money delivered to the agent of an express company to be

sent to a place beyond the route of a company, it appeared that plaintiff paid charges through, and received a receipt for the money to be sent containing a memorandum of such payment. *Held*, that on the facts, *q. v.*, there was not a special contract to carry to destination.

The receipt contained a clause limiting the liability of the company to the risks of carriage to the end of its route. The consignor could not read, and the agent read the principal part of the receipt to him, but did not read that clause. *Held*, that as that clause was expressive only of the company's liability under the law, the omission to read it was no fraud on the consignor.

Such a receipt, like any simple receipt, may be explained by parol evidence.

Case against an express carrier for negligently so carrying a package of money that it was lost, with a count in trover. The case was referred, and the referee reported facts as follows:

On January 3, 1877, the plaintiff delivered a package of money of the value of $300 to D. Paul, agent at East Berkshire of the defendant,—a firm composed of Benjamin P. Cheney and Nathaniel White, and a common carrier in the express business over a large number of railroads in New England, including the road through East Berkshire to Essex Junction—to be sent thence by express to Joseph Melendy, in Jericho, a place beyond Essex Junction. The plaintiff asked Paul, when he handed him the money, to put it into an envelope and seal and direct it, which he did, directing it as follows: "J. H. Melendy, Jericho, Vt. Via Stage from Essex Junction to Jericho." The plaintiff at the same time told Paul that he wanted to pay the express charges. Paul on examination of the tariff told the plaintiff the charges would be thirty-five cents to Essex Junction, and that he could not bill beyond that place as the defendant's route did not extend beyond it. The plaintiff said he wanted to "pay through." Paul replied that he thought it would cost twenty-five cents by stage, but that if it should be more the plaintiff must pay it. The plaintiff thereupon paid Paul sixty cents; and Paul gave him a receipt, made by filling out the usual printed form, which, except in certain matter printed in the margin, was, when so filled out, as follows:

United States and Canada Express.
Domestic Bill of Lading.

$300. East Berkshire, Jan'y 3, 1877.

Received of Frank Hadd sealed package, said to contain Three Hundred Dollars for J. H. Melendy of Jericho.

☞ To be forwarded to destination at our risk, so far only as our route extends. . . . In no event to be responsible except as forwarders.

Paid 60 cts. Thro'.

For the Proprietors, D. Paul.

In the margin was printed the names of the various railroads over which the defendant was doing business, together with the length

of each road in miles. The plaintiff was unable to read, and Paul read to him that part of the receipt containing the direction, the description of the package, and the acknowledgment of its receipt, and that part only; and the plaintiff had no knowledge of the contents of the receipt except as it was read to him. Paul made entry of the package in the express books of the defendant, stating the names of the consignor and consignee, the place to which it was bound, and the place to which it was to be billed, the sum paid for carriage, and, under the head of remarks, wrote the word "thro'"; and on the following morning the package was billed to Essex Junction, where it arrived on the same day. It was there delivered on the next morning to Howe & Folsom, who owned and operated the stage line from Essex Junction through Jericho to Underhill, and were common carriers and carriers of express matter along their route, to be carried to Jericho, and they gave a receipt for it on the defendant's book, and received from the defendant twenty-five cents, the remainder of the sum paid by the plaintiff after deducting the defendant's charges for carriage to Essex Junction. Howe & Folsom carried the package to Jericho the same morning, and delivered it to Field & Percival, who were their agents to receive and deliver express packages at that place, Howe placing it on the counter of their store, and Percival putting it into a drawer, where they were accustomed to put such packages. On the following day it was discovered that the package had disappeared, and it was never delivered to Melendy. It did not appear that he was notified of its arrival, or that he knew of it till after it was lost. It appeared that it was the custom of the defendant to receive and carry all express packages whereon charges were prepaid, and all on which they were not prepaid, when the packages were worth $3 or more, whether delivered by the consignors, or by other carriers, and whether directed to places on or to places off its route; that if they were prepaid to points beyond its route, the defendant would receive its part of the charges and pay the residue to the connecting carrier, and if not prepaid the defendant would charge its portion for carriage to the connecting carrier, who would collect at the destination; that there was no contract or business arrangement between the defendant and Howe & Folsom as to carrying express matter, unless one be inferred from the facts shown, and that neither had any share of or interest in the receipts of the other in such business, but that it was the custom of Howe & Folsom to receive from the defendants such express packages as were directed to points on their route, pay the defendant its charges, if they had not been paid, and receive their charges of the defendant, if the charges had been prepaid, and also in like manner to deliver express packages to the defendant under a like custom as to the payment of charges; and that Field & Percival were not employed by the defendant as its agent to receive or deliver express

matter, unless such an agency might be implied from the facts found. The defendant introduced in evidence subject to objection certain of its general rules requiring its agents to let it be understood, when anything was received, to be forwarded beyond its route, that its responsibility ended with delivery to the usual conveyance beyond its route, and also giving such agents notice that they were to exercise no discretion, but were to act according to instructions in all cases; and the referee found therefrom that Paul was instructed to follow the defendant's general rules strictly. Neither the plaintiff nor Melendy had any knowledge of those regulations, or of the course of the defendant's business, or of the extent of its route, or of Paul's authority, and they made no inquiry in regard to such regulations. That part of the receipt given by Paul to the plaintiff that gave the defendant's routes, and that part that related to the limitation of risks were objected to, and the receipt was admitted in evidence subject to objection. The referee found that, if on the facts stated the plaintiff was entitled to recover, he should recover $300, with interest thereon from January 6, 1877; and that if he was not entitled to recover, the defendant should recover its cost.

The plaintiff excepted to the report because of the admission of testimony to show that the defendant's route did not extend beyond Essex Junction towards Jericho, to show the existence of the stage line and the custom under which it was operated, to show the defendant's instructions to Paul, and to show what Paul said in contradiction of the receipt about billing the package; and because of the admission of that part of the receipt to which objection was made.

At the April Term, 1879, the court, Royce, J., presiding, rendered judgment, pro forma, for the plaintiff for $300, with interest and costs; to which the defendant excepted.

Noble & Smith and C. W. Porter, for defendant.

The defendant was not bound to carry through. In the absence of special contract, carriers receiving goods marked to a point beyond their route are responsible as carriers only to the end of their route, and for safe and seasonable delivery to the succeeding carrier in the direction of the transportation. Edwards Bailm. s. 578; 2 Redf. Ry. s. 154; Farmers and Mechanics' Bank *v.* Champlain Transportation Co., 23 Vt. 186, 209; Nutting *v.* Connecticut River R. R. Co., 1 Gray, 502; Root *v.* Great Western R. R. Co., 45 N. Y. 524; R. R. Co. *v.* Manufacturing Co., 16 Wal. 318, 324. The receipt was not such a contract. Grace *v.* Adams, 100 Mass. 505; Louisville and Nashville R. R. Co. *v.* Brownlee, 8 Reporter, 144; Rice *v.* Dwight Manufacturing Co. 2 Cush. 80. The receipt did not enlarge nor limit the obligation imposed by law. Nutting *v.* Connecticut River R. R. Co., supra. But omit that portion that was not read: there was no special contract.

Wash. Manufacturing Co. *v.* R. R. Co., 113 Mass. 492. Prepayment of the freight did not enlarge the carrier's obligation. Farmers and Mechanics' Bank *v.* Champlain Transportation Co., supra, and cases passim. The burden of showing a special contract rests on the plaintiff.

But, if there was a special contract, the defendant, by procuring the package to be carried through according to custom, was absolved.

H. C. Adams and D. G. Furman, for the plaintiff.

The contract was to carry through. Weed *v.* Saratoga and Schenectady R. R. Co., 19 Wend. 534; Cary *v.* Cleveland and Toledo R. R. Co., 29 Barb. 36; Baltimore and Philadelphia Steamboat Co. *v.* Brown, 54 Pa. St. 77; Illinois Central R. R. Co. *v.* Johnson, 34 Ill. 389; Cutts *v.* Brainerd, 42 Vt. 566, and numerous other cases. The paper given to the plaintiff by Paul, except as to the part not read, was the exclusive evidence of the contract; but proof that a part of it was not read was admissible. The omission to read to the plaintiff that part of the receipt that limited the defendant's liability was in legal effect a fraud. King *v.* Woodbridge, 34 Vt. 565. There is nothing to show assent by the plaintiff to the limitation expressed in the part not read, but the contrary. Cole *v.* Goodwin, 19 Wend. 251; Perry *v.* Thompson, 98 Mass. 249, and other cases. The cases in which the contract is for carriage through are unlike this. See Root *v.* Great Western R. R. Co., 45 N. Y. 524; Reed *v.* United States Express Co., 48 N. Y. 462; Ætna Insurance Co. *v.* Wheeler, 49 N. Y. 616; Lamb *v.* Camden and Amboy R. R. Co., 46 N. Y. 271.

Paul had authority to do what he did, and could bind the defendant to carry through. Hart *v.* Rensselaer and Saratoga R. R. Co., 4 Seld. 37. But the defendant having introduced the receipt is estopped by it. Chouteaux *v.* Leech, 18 Pa. St. 224, 231.

The undertaking of an express carrier ordinarily implies actual delivery to the consignee. 2 Redf. Ry. s. 154; Witbeck *v.* Holland, 45 N. Y. 13; American Union Express Co. *v.* Robinson, 72 Pa. St. 274. The case Farmers and Mechanics' Bank *v.* Champlain Transportation Co., 18 Vt. 131, and the case between the same parties, 23 Vt. 186, are distinguishable. There is no proof that the plaintiff knew of the custom in regard to delivery. It was therefore no part of the contract. Linsley *v.* Lovely, 26 Vt. 123; Packard *v.* Earle, 113 Mass. 280.

The opinion of the court was delivered by

Veazey, J.—It has been repeatedly decided in the American courts that, in the absence of special contract, common carriers, including express companies, receiving parcels marked to a point beyond their own route, and having no special business relations with other carriers, are only responsible as common carriers to

the end of their own route, and the safe and seasonable delivery to the succeeding carrier in the direction of the transportation. 2 Redf. Ry. s. 154; Edwards Bailm. s. 578; Nutting v. Connecticut River R. R. Co., 1 Gray, 502; Root v. Great Western R. R. Co., 45 N. Y. 524; R. R. Co. v. Manufacturing Co., 16 Wal. 318, 324. In Morse v. Brainerd, 41 Vt. 550, Chief Justice Pierpoint, after referring to the English rule, says: "But in this country the rule established in most of the States is, that the company is liable for injuries that occur beyond the termination of their own road, only when they stipulate to deliver the property at a point beyond, and that is the extent to which the decisions in this State have, as yet, gone, and is as far as we are now disposed to go." Farmers and Mechanics' Bank v. Champlain Transportation Co., 23 Vt. 186, 209.

The plaintiff seeks to recover in this case not by an attack of this rule, but upon the claim that there was a special contract by the defendant to carry the package through and deliver it to the consignee; and that this is evidenced by the receipt given to the plaintiff, and that the defendant is precluded from showing by parol anything to vary this contract.

There is no claim, and upon the facts found by the referee no ground of claim, that the defendant fraudulently misled or attempted to mislead or deceive the plaintiff, when he delivered the package for transportation. This suit is an action on the case against the defendant as a common carrier for its negligence and failure to transport and deliver this package of money according to said special undertaking, with a count in trover. The receipt constituting the alleged contract contained this provision: "To be forwarded to destination at our risk so far only as our route extends. . . . In no event to be responsible except as forwarders." It also contained the names of the railroads constituting its routes. The point of destination of the package was not on any of its routes. The plaintiff sought before the referee and now seeks to have this receipt, which he claims is a contract in writing, varied by striking out or disregarding the part limiting the liability of the defendant, on the ground that that part was not read to the plaintiff, which fact he proved by parol. He asks to have the receipt construed in the light of his parol evidence, but claims that the explanations of the defendant must be excluded.

But without reference to this inconsistency, we think there is nothing in this case to take it outside of the well-established rule in this State that simple receipts not under seal are open to explanation by parol evidence; and that the evidence received by the referee as to what took place between the plaintiff and the defendant's agent, Paul, when the money was delivered to the latter, was properly received. The case much relied on by the plaintiff, the Baltimore and Philadelphia Steamboat Co. v. Brown, 54 Pa. St.

77, is a direct authority to the extent that such a receipt as this may be explained by parol.

In the light of this evidence it seems plain to us that the only undertaking assumed by the defendant or that the plaintiff had a right to understand was assumed, was to transport and deliver the package to the stage line at Essex Junction. Paul told the plaintiff he could bill it only to that place, because the defendant's route only extended to that place. What was said and done about paying for the transportation beyond there fairly indicated that the defendant was to assume nothing beyond that point. There was no business arrangement between the defendant and the proprietors of the stage line in relation to carrying express matter. The custom between them in this respect was not such as to affect either company's liability to patrons for the acts of the other. The case is plainly distinguishable from Morse *v.* Brainerd, 41 Vt. 550, where there was a business arrangement entered into between the several roads constituting a continuous line. In 2 Redf. Ry. 107, the author says: "Express companies have generally been held responsible only for the transportation to the end of their own line, and careful delivery to the next company upon the route most direct to the destination of the parcel, with proper directions to the carrier to whom the parcel is successively delivered. And it has been said that where the goods, in such cases, are delivered to the carrier, marked for a particular destination, without any specific instructions in regard to the transportation more than what is to be inferred from the marks on the package, the carrier is only bound to transport and deliver them according to the established usage of the business, whether that be known to the consignee or not."

The plaintiff claims that the omission by Paul to read to the plaintiff the words in fine print in the receipt, to the effect that the defendant assumed no risk except over its own route, was in legal effect a fraud upon the plaintiff, though it may not have been so intended; and he cites King *v.* Woodbridge, 34 Vt. 565. That case affords no aid in this one. They are dissimilar in facts and questions involved. Moreover, there is no ground for application in this case of the principle discussed by the learned judge in that one, because the obligations of the defendant here were the same as they would have been without that part being in the receipt which Paul omitted to read. It was only the incorporation of such limitation of liability as would have existed without it. The omission to read it was simply the omission to read that which was of no consequence in the receipt so far as it affected the obligations or rights of the parties. But if this were otherwise, the plaintiff was not deceived or injured by such omission, because Paul told the plaintiff that the defendant's route only extended to Essex Junction, and that he could bill the package only to that

point. We think the plaintiff was fairly informed of what the defendant undertook to do.

Judgment reversed, and judgment for the defendant to recover its costs.

See note, p. 439.

The Macon and Western R. R.

v.

Meador Brothers.

(65 *Georgia Reports*, 705. *September Term*, 1880.)

On November 12th a railroad received certain boxes of tobacco to be carried from Atlanta to Macon; they reached the latter place on November 15th, and under an agreement between the consignee and the carrier, they were set aside by the latter in its depot to be sold and the proceeds used to pay past due freights, it being agreed that the balance if any should go to the consignee. He did not receive the boxes and then turn them over, nor did he assign the bill of lading, nor was the freight paid. On December 12th the consignors sought to stop the boxes in transitu and failing to obtain them on demand, sought to recover against the carrier:

***Held*, that no actual delivery had taken place so as to prevent a stopage in transitu.**

Can a carrier purchase the title of a vendee and set it up against the vendor's right of stoppage in transitu? Quære.

Bibb Superior Court. October Term, 1879. Reported in the decision.

Lanier & Anderson, for plaintiff in error.

Blount & Hardeman; Hill & Harris, for defendant.

Jackson, C. J.—Meador Brothers shipped from Atlanta to Macon certain boxes of tobacco consigned to Carlos. The Macon and Western R. R. Co. received them as carriers, about the twelfth day of November, 1872, and they arrived in Macon about the fifteenth, and shortly thereafter the treasurer of the company, Brantley, under an agreement and order from Carlos, as he testifies, set the goods or tobacco aside in the depot to be sold by the company to pay past freights, and balance to Carlos, if any. After this transaction, Meador Brothers instituted proceedings to stop the goods in transitu, Carlos having been forced into bankruptcy, and the question is whether on the twelfth of December this tobacco had been so delivered into the possession of Carlos, as to defeat the right of the vendors to stop their transit to him, and to vest in the carrier a right to exact his indebtedness for freight on other goods out of these goods before the vendors could be paid?

Our Code declares that the right of stoppage in transitu continues until vendee obtained actual possession of the goods. In the

ordinary signification of those words, there is no evidence in this record that the consignee ever did obtain the possession. He did not go with Brantley and have these boxes set apart, but gave orders in respect to goods consigned to him generally, and perhaps an order designating these boxes, though that appears uncertain, looking at all the testimony in the record. They were set apart only by being moved from one part of the carriers' warehouse to another, according to Brantley's testimony, without the possession having been actually at all in Carlos. This possession was only constructive. The boxes were only moved from one part to another part of the same apartment where the company had deposited them for the consignee, and where its freights were commonly stored until delivered to the consignees. The bill of lading had not been delivered up or transferred, nor had the freight on these boxes been paid. Under these circumstances we cannot see actual possession in Carlos, or actual delivery to him, or to anybody for him. Brantley was acting for the road, and was its agent.

Besides, it is very questionable whether the carrier can buy the vendee's title as against the vendor's right of stoppage in transitu from the vendee, and set it up so as to defeat that right under our Code. Section 2076 enacts that he cannot dispute the title of the person delivering the goods to him, by setting up adverse title in himself, or a title in third persons, which is not being enforced against him. See also Hilliard on Sales, 301.

However that may be, we think that our Code contemplates actual delivery and possession, as distinguished from constructive possession, and there was no actual delivery or possession here.

Indeed, at common law such a delivery as this is would hardly avail to defeat the vendor's right to stop the goods in transitu. Hilliard on Sales, 301; 3 Bos. & Pul. 49.

The tobacco was sold on credit. Carlos was put in bankruptcy, and therefore was not able to pay for the tobacco, and was insolvent in the meaning of § 2643 of the Code, which declares that where credit is given and the insolvency of the purchaser is made known to the seller, he may still exercise the right to stop the goods before they reach the consignee. See also Code, § 2650.

We think that the verdict of the jury for the plaintiffs is right under the law and evidence on the case made, and that the court did not err in overruling the motion for a new trial.

Judgment affirmed.

See note to Wigton v. Bowley, 3 Am. and Eng. R. R. Cas. 330.

GWYN, HARPER & Co.

v.

RICHMOND AND DANVILLE R. R. Co.

(85 *North Carolina Reports*, 427.)

Goods bought and paid for were delivered to a railway company, whose bill of lading was executed to the vendor acknowledging the receipt of the goods to be conveyed to the vendee. *Held*, that the contract for transportation is in legal effect with the vendee, and the company liable to him for non-delivery of the goods. In such case the title vests in the vendee purchaser, and a delivery of the goods to the carrier is a delivery to the purchaser himself.

Where one through his agent sells goods to another, and they are shipped to the purchaser, the agent has no right to stop the goods in transitu, because his principal owes him on account of money advanced in the purchase of the goods.

(Jenkins v. Jarrett, 70 N. C. 255; Ober v. Smith, 78 N. C. 313, cited and approved.)

CIVIL action removed from Caldwell and tried at Fall Term, 1881, of Burke Superior Court, before Seymour, J.

The action was brought to recover the value of a certain lot of cotton. Judgment for plaintiffs, appeal by defendant.

Messrs. Armfield, Folk and Cilley, for plaintiffs.
Messrs. Reade, Busbee & Busbee, for defendant.

SMITH, C. J.—On March 10th, 1880, J. P. Harper, one of the plaintiffs, acting for the plaintiff firm, bought from McAuley & Meacham, at Charlotte, forty-nine bales of cotton, of which twenty were then in possession of their agents, Neely & Bro., at Linwood, on the line of the defendant's road, and paid for the same. By direction of the vendors, Neely & Bro. on the next day delivered the cotton to the defendant company, taking therefor a shipping receipt in the name of their principals for the transportation and delivery of it to the plaintiffs at Icard, a station on the Western North Carolina R. R. The receipt was retained, and at the same time Neely & Bro. drew on the said McAuley & Meacham for a sum over $700, a balance due for moneys advanced in their purchases of cotton. Receiving a telegram from the latter that the draft would not be paid, M. Neely pursued and overtook the cotton at Salisbury, and presenting the receipt to the defendant's agent at that place with a demand for a redelivery, was allowed to take it from the custody of the company, and afterwards converted it to his own use.

M. Neely testified that there was "a universal custom among

cotton buyers, when they had not been paid in full for their advances, upon shipping cotton, to hold on to the bill of lading as evidence of their title."

The defendant requested the court to instruct the jury:

1. That if the custom testified to prevailed, and McAuley & Meacham were indebted for moneys so advanced by their agents, the latter had still a lien on the cotton and a right to resume possession from the defendant.

2. That the existence of this usage put the plaintiffs upon inquiry as to the lien, and there was no evidence of their having made such inquiry.

The court charged that when the defendant signed the bill of lading it undertook to carry safely and deliver the cotton to the plaintiffs at Icard, and failing to do so, is liable, unless some sufficient excuse is shown; that the contract of the plaintiffs with McAuley & Meacham vested in the former such title as the latter had in the cotton; and that while M. Neely & Bro. could retain possession until repaid their advances, yet when they marked the bales with the plaintiffs' name and transferred them to the custody of the defendant for carriage and delivery to the plaintiffs at the place of destination, they parted with their lien, and the plaintiffs having thus acquired full title could recover, notwithstanding the vague and indefinite custom governing the dealings between principals and their agents as shown in evidence.

The law applicable to the facts of the case has been, in our opinion, correctly explained in the instructions to the jury. The sale of a specific chattel by words operating in presenti transfers the vendor's title to the vendee, with a right to retain possession until the purchase money is paid, in the absence of any contrary intent expressed or implied. When the purchase money is paid, the title vests absolutely in the purchaser, and a right to immediate possession. Hilliard Sales, §§ 2 and 4; Jenkins *v.* Jarratt, 70 N. C. 255. So a delivery of goods, bought and paid for, to a carrier for transportation and delivery to the purchaser, is a delivery to the purchaser himself. The carrier is in such a case the vendee's agent to receive and accept the goods. Hilliard Sales, § 42.

The authorities are numerous, say the court, in Ober *v.* Smith, 78 N. C. 313, "to the effect that a delivery of goods to a carrier designated by the purchaser is of the same legal effect as a delivery to the purchaser himself, and that it is not necessary that he should employ the carrier personally or by some agent other than the vendor," and the same result follows when the mode of transportation is the usual or only one existing. It is equally true that the agent's right to retain until reimbursed what he may have paid out for his principal in purchasing the goods, may be surrendered and lost by his execution of his principal's contract of sale in making a delivery to the vendee.

A lien is defined to be "a right to hold possession of another's property for the satisfaction of some charge upon it." 3 Pars. Cont. 234. The right of lien cannot exist without possession, and is an inseparable incident to possession. The surrender of the one is the extinction of the other; and this applies with greater force when the surrender is to a purchaser from the vendor against whom it exists in favor of his factor. Hill. Sales, ch. 16, p. 198.

The bill of lading itself executed to the vendors and acknowledging the receipt of the cotton from them to be conveyed to the plaintiffs, so far from evidence of title in the agents, shows it to be in the plaintiffs, and that the carrier's contract is in legal effect with them. The redelivery to the agents upon their demand was a breach of the defendant's contract, and rendered the company directly liable for the value of the surrendered goods.

The "usage" relied on is wholly unavailing to affect or defeat the rights of the true owners, and is foreign to the issue between the parties to the action.

The doctrine of stoppage in transitu furnishes no analogy favoring the defendant's exemption from liability, and is but a limitation upon the general rule which deems delivery to a carrier to be delivery to the consignee purchaser. It exists only when the purchase money has not been paid and the purchaser becomes insolvent, and is but an extension of the right of lien existing previous to the delivery to the carrier. The vendor is in such case permitted to regain possession before the goods reach the hands of the consignee. Actual as distinguished from constructive possession acquired by the consignee, puts an end to the right of stoppage. Hilliard Sales, pp. 209, 216, et seq. The principle governing the relations of these parties has no application to the present case.

The plaintiffs have bought and paid for the goods, and the delivery vests in them the title and right of action against the defendant for the value of them.

There is no error, and the judgment must be affirmed.

No error. Affirmed.

See Wigton v. Bowley, 3 Am. and Eng. R. R. Cas. 330.

CAMDEN AND ATLANTIC R. R. CO.

v.

HOOSEY.

(*Advance Cases, Pennsylvania. February* 20, 1882.)

A., a passenger upon a railroad train, was unable, in consequence of the crowded condition of the cars, to obtain a seat. Although there was stand-

ing room inside he placed himself on or near the edge of the outside platform, and rode there for some distance, with his back against the end car window, holding on by a little iron rail affixed to the car. While in this position a jolt occurred, by which he was thrown upon the track and injured. Suit having been brought by him against the company to recover damages for the injury done him:

Held, that the court should have peremptorily instructed the jury that the plaintiff had been guilty of such contributory negligence as to defeat his right of recovery.

Mercur, Gordon, and Trunkey, JJ., dissent.

Semble, that as a general rule and under ordinary circumstances, it is the duty of a railroad company to provide every passenger with a seat, and that if a passenger exercising reasonable care and prudence is injured in consequence of the company's neglect of duty in this regard, the latter must respond in damages.

ERROR to the Common Pleas, No. 1, of Philadelphia County.

Case, by John Hoosey, against the Camden and Atlantic R. R. Co., to recover damages for injuries alleged to have been occasioned by the negligence of the defendant company's servants. Plea, not guilty.

At the first trial (before Biddle, J.) a nonsuit was granted, which the Court in banc subsequently took off. At the second trial (before Peirce, J.) the plaintiff showed that on August 28th, 1878, he, in company with the St. Ann's Temperance Society, went on an excursion over the defendant's road to Atlantic City. On the down trip there were seats for all the excursionists, but on the return trip the train was overcrowded; the plaintiff testified: "I got on the train after it had started from the Excursion House; was about one hundred and fifty yards from Excursion House, may be more."

The remainder of the plaintiff's testimony, showing that failing to obtain a seat, he went upon the platform, is sufficiently stated in the opinion of the Court.

About midway between Atlantic City and Camden, being thus upon the platform, he was thrown off by a jolt, and met with such injuries as rendered necessary the amputation of an arm.

One of the clergy in charge of the excursion testified that the plaintiff had evidently been drinking, but denied that he was drunk.

The person who found him lying on the roadside, the physician, and the druggist who attended him afterward, all testified that he was very drunk. The train consisted of twenty cars; no one else was injured.

The defendants requested the Court to charge, inter alia:

(3d) That, apart from any rule or notice upon the subject, it is negligence in a man of full age to stand upon or cross a platform of a car in rapid motion upon a steam railroad. Answer. I affirm, unless compelled by circumstances to do so.

(4th) That, even if the jury believe that the object of the plain-

tiff in going out upon the platform, from which he fell, was to seek a seat in another car, and the car from which he had gone contained no vacant seat, still it would have been negligence on his part to pass out upon the platform while the cars were in motion, so long as it was possible for him to remain standing in the car which he left. Refused.

(9th) That the evidence shows negligence on the part of plaintiff which contributed to produce the injury complained of, and therefore he cannot recover. Answer. I decline; it is for the jury to determine if there was any contributory negligence on the part of plaintiff.

The Court charged, inter alia, as follows: "It is a general rule and principle of law that negligence on the part of the defendant, without contributory negligence on part of plaintiff, entitles him to recover. The law does not measure any amount of negligence necessary to make out a case of contributory negligence, but recognizes all degrees alike, and this is for you to say. Take the case, and decide to the best of your judgment.

Verdict for plaintiff for $2000, and judgment thereon. Defendants thereupon took this writ, assigning for error, inter alia, the above answers to their points.

Henry B. Freeman and Geo. M. Dallas, for plaintiffs in error.

A railroad company is not bound absolutely, and under all circumstances, to furnish passengers with seats; all that is required is due skill and care in the employment of the facilities at their command. Meir *v.* R. R. Co. 14 Sm. 225; 2 Redfield on Railways, 218.

In any case, if the plaintiff below assumed any position of hazard, the company is relieved of responsibility. Siner *v.* Railway Co., 37 L. J. Ex. 98; Lucas *v.* Id., 6 Gray, 64; Saunders on Negligence, 25–28; Hagan *v.* Railway, 10 Weekly Notes, 360; Hubley *v.* Id., L. R., 1 Ex. 13.

Under the testimony, there was no conceivable necessity for the plaintiff to remain upon the platform; for manifestly if there was room for him to pass through the cars, there was room for him to remain within them; his failure to do so was, therefore, contributory negligence, and his Honor ought to have peremptorily instructed the jury to find for the defendants. Goshorn *v.* Smith, 11 Norris, 435; Baker *v.* Fehr, 10 Weekly Notes, 57; R. R. Co. *v.* Armstrong, 2 Sm. 282; R. R. Co. *v.* Yerger, 23 Sm. 121; Id. *v.* McIlwee, 17 Id. 315; Id. *v.* McClurg, 6 Id. 294; Id. *v.* Aspell, 11 Harris, 147; Lewis *v.* R. R., 13 Am. Law Reg. (N. S.) 285.

E. A. Anderson and Francis E. Brewster (John H. Fow with them), for defendant in error.

Overcrowding of cars is negligence. Wharton on Negligence, § 64; Weed *v.* Panama R. R., 5 Duer, 193; Caldwell *v.* Murphy, 1 Id. 233; Edwards *v.* Lord, 49 Me. 279.

It is not negligence to ride on the platform; indeed, it has been held to be not improper on the part of a passenger who cannot find a seat. Sherman and Redfield, Neg., 284; Messel *v.* Lyons, 8 Allen, 234; Marquette *v.* R. R., 33 Ia. 570; Willis *v.* L. I. R. R., 34 N. Y. 682.

And this, though there be a notice of a rule on the part of the company to the contrary. Clark *v.* Eighth Av. R. R., 32 Barb. 657.

The question of contributory negligence, then, was solely for the jury, and was left to them under proper instruction. Casey *v.* R. R., 25 Sm. 83; R. R. Co. *v.* White, 7 Norris, 327; R. R. Co. *v.* McIlwee, 17 Sm. 315; Ferry Co. *v.* Monahan, 10 Weekly Notes, 46.

STERRETT, J.—The single breach of duty with which the defendant below was specifically charged, as the only ground of liability to the plaintiff for the injury he sustained in falling off the platform of the car on which he was then standing, was the failure of the company to provide a sufficient number of cars to seat all the passengers on the train.

Without assenting to the broad proposition contended for, that a railroad company using steam motive power is bound absolutely, and under all circumstances, to provide every passenger on the train with a seat, it cannot be questioned that, as a general rule and under ordinary circumstances, it is the duty of such company to provide suitable car accommodations and seats for those whom it undertakes to carry; and if a passenger, exercising reasonable care and prudence, is injured in consequence of the company's neglect of duty in that regard, the latter is liable to respond in damages for the injury thus occasioned solely by its own negligence. There appears to be nothing in the circumstances of this case to exempt the company from that general rule of duty; and if its negligence was the proximate cause of the plaintiff's injury, the liability of the company would necessarily follow, unless the plaintiff himself was guilty of negligence which contributed thereto. His contention was that, in common with many other passengers, he was unable to procure a seat, and while searching for one, he was thrown from the platform of one of the cars, and thus sustained the serious injury which resulted in the loss of his arm. The overcrowded condition of all the cars composing the train, and the consequent inability of the plaintiff and others to procure seats, were facts clearly proven.

Assuming for the present that the company was justly chargeable with negligence resulting in injury to the plaintiff below, and that, under the circumstances, he was not guilty of contributory negligence in passing from car to car in search of a seat while the train was in rapid motion, can it be pretended that it would not be

gross negligence in him to voluntarily take a position near the outer edge of the platform, and remain there until, by an ordinary jolt of the car, he lost his equilibrium and was thrown off? This is precisely what the evidence as to the plaintiff's position at the time of the accident clearly establishes. Apart from his own testimony, there is very little evidence tending to show precisely where he was at and shortly before that time, and there is certainly nothing that militates against his own version of what then and there occurred. He testified, in substance, that on entering the cars at Atlantic City, and finding the rear one overcrowded, he pushed his way forward, searching in vain for a seat, until he reached the front car. After remaining there a short time, he started back; and, quoting from his own testimony as found in the bill of exceptions, he says: "I left that car because I was tired standing there; had been there seven or eight minutes; started back through the cars, and went through some ten or twelve cars; stopped several times going through; can't recollect the time it took to go through back; could not get through for crowd; it was pretty near the same going back as coming through; I stopped outside on platform; rear platform of fourth or fifth car, right outside the door; stood on one side; the right-hand side coming up. When I got out first, I had hold of a little rail or something across the window; I held on to the little rail across the window to keep from falling off; let go to go through the cars; I was standing there a minute or two or so; it was two minutes to the best of my knowledge; can't tell if it was longer; when I left, I started to go through, when the car got a jolt and somebody struck me; could not count how many passengers passed through while I was on the platform; they were coming in the opposite direction, up towards the engine, and some were going through the same way, towards the rear of the train; can't say whether the car door of the car I passed out of was open; when I went out, the door of the opposite car, I am positive sure, was open; saw parties coming from the opposite car; I did not stand aside inside of car, because I could not see them well, and because I wanted to go through myself; I came out and stood with my back against the car and hand on the rail, resting myself; I was leaning with my back against the car and my hand behind me; people were passing through into the car I left; there was a crowd; I left that car to go into an adjoining car; while standing there the car got a jolt, and somebody behind me struck me and staggered me; the jolt and it had something to do with it; can't tell whether the jolt without the other would have thrown me off; as soon as I got the jolt, I made a grab with the right hand, and missed, and caught with the left the rail on the platform; there is a similar rail on the body of the car to assist people on and off; I tried to get hold of the rail on the body; I was thrown partly around, and caught the

dasher rail with my left hand; I was thrown with my chest towards the inside track; train was travelling very rapidly; my arm was mangled."

It was very evident, from the plaintiff's own statement, that at the time of the accident and for some minutes before, he was not in the act of passing from one car to another in search of a seat; on the contrary he was standing quite near the edge of the platform with his back to the end window of the car. He was not only in the position of known danger, but was there voluntarily and in disregard of the rules of the company. There is nothing in the testimony from which a jury would be justified in coming to any other conclusion. While he was thus standing on the platform, persons passed from one car to the other in both directions, and there is nothing whatever to show that he could not have gone into the next car if he had been so disposed. Neither he nor any other witness pretends to say it was necessary for him to stop and stand on the platform.

In the seventh point of the defendant below, the Court was requested to charge: "That even if a search for a seat was the real purpose of the plaintiff in going out on the platform, and if it were not negligence for him to have crossed from car to car for that purpose, yet, if the jury believes, from the evidence, that he lingered on the platform instead of immediately crossing, the verdict should be for the defendant." The learned judge, in affirming this proposition, added the qualifying words: "Unless compelled thereto by circumstances." The jury was thus authorized to inquire whether or not the plaintiff was compelled by circumstances to linger on the platform. We see nothing in the testimony to warrant the submission of this inquiry to the jury. As already intimated, there was not a particle of testimony from which it could be reasonably inferred that plaintiff was compelled to take or retain the position he did on the platform. Having shown by his own testimony that, at the critical juncture, he was in a position where no one of ordinary prudence should have placed himself, it was incumbent on him to prove that he was there from necessity and not from choice. While the latter was clearly shown, there was no testimony tending to prove the former. The point should have been affirmed without the qualification complained of; but, for reasons already suggested, we think the Court should have gone further and instructed the jury as requested in the defendant's ninth point, which was: "That the evidence shows negligence on the part of plaintiff, which contributed to produce the injury complained of, and therefore he cannot recover."

The dangerous position on the platform in which the plaintiff voluntarily placed himself while the cars were in rapid motion, was undoubtedly the immediate cause of his being jolted off. If

there has been any testimony from which it could have been reasonably inferred that he was there from necessity and not from choice, it would have been a question for the jury, but, in the absence of such evidence, it was error to refuse the point and leave it to the jury to determine whether he was or was not guilty of contributory negligence.

Of all the passengers on a long train of twenty overcrowded cars, the plaintiff was the only one who appears to have been injured. If he had submitted, as many others did, to the inconvenience of standing inside the cars, or if he had been guilty of no greater imprudence than passing from car to car while the train was in rapid motion, it is not at all probable he would have been injured. His much to be regretted misfortune was the result of his own carelessness. This was clearly proved by uncontroverted testimony, from which no other conclusion could reasonably be drawn.

Judgment reversed.

Mercur, Gordon, Trunkey, JJ., dissent.

The principle laid down in the above case, that the simple fact of riding upon the platform when the seats of the car are full does not amount to contributory negligence per se on the part of a passenger, is generally recognized throughout the United States. The subject may be considered (1) with relation to roads operated by steam, and (2) with relation to horse railroads.

(1) With relation to roads operated by steam. The question of contributory negligence on the part of a passenger in riding upon the platform of cars running upon such roads has been chiefly considered in the courts of New York. By a statute passed in that State in 1850 it is provided that:

"In case any passenger shall be injured while on the platform of any car in violation of the printed regulations of the company posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury, provided the said company at the time furnished room inside of its passenger cars sufficient for the proper accommodation of its passengers."

The provisions of this statute have, of course, affected largely the decisions of the courts. A brief review of these decisions may prove instructive.

In Colegrave *v.* Harlem and New Haven R. R. Co., 6 Duer, 382, the facts were these: Plaintiff got upon the train at a way station upon the front car. He entered the car but found the seats full. There were notices posted up such as were specified in the statute. Plaintiff nevertheless stepped back upon the platform, and while still standing there, and before he was able to get a seat, a collision occurred by which he was injured. He brought suit against the railroad company, and on the trial it was shown that there were vacant seats in the rear cars. The court nevertheless held that the plaintiff was not absolutely precluded from recovering, and that under the circumstances the question whether or not he had been guilty of contributory negligence was for the jury. This case was afterwards affirmed in 20 N. Y. 492. In Willes *v.* Long Island R. R. Co., 34 N. Y. 670, the facts were somewhat similar. Here also the plaintiff first entered the front car, and finding the seats full took a place on the platform. While still standing there his fare was collected by the conductor who then passed on. Owing to the negligence of the engineer a jolt occurred by which plaintiff was thrown to the ground and injured. Suit being brought by him against the company, it was held here also that the question of his contributory negligence was for the jury.

There was some evidence in the case that one entire seat in the car through which plaintiff passed was occupied by a single passenger in a recumbent position, and also that other seats were occupied only by boxes and bundles. It was argued by defendant that it was the plaintiff's duty to secure one of these seats for his own use, but upon this point the court said that under the statute it was the duty of the company to find seats for all its passengers. "When the company fails to comply with the conditions it must find other grounds of immunity if it would avoid responsibility for its wrongs. It is not sufficient that there may have been proper accommodations in other cars inaccessible to the passenger, nor that he might possibly have procured for himself the accommodations which the defendant failed to furnish, by displacing the person of one and the property of another in the exercise of an authority which properly belonged to the conductor. He owed no such duty to defendant, and he forfeited none of his rights by submitting to a temporary inconvenience to which he was subjected against his wish, and through no fault of his own."

To the same effect is Collins *v.* Albany and Schenectady R. R. Co., 12 Barb. 492, where the evidence showed that the plaintiff left his seat and went upon the platform while the train was standing still, certain repairs being necessary to the engine before it could proceed. While thus upon the platform another train collided with that upon which plaintiff was standing whereby an injury to him was occasioned. Under these circumstances it was also held that the question of the plaintiff's contributory negligence was for the jury.

It has been decided, however, that where there are vacant seats in the cars, and proper notices posted up, the mere granting of permission by a conductor to ride on the platform will not prevent the company from taking advantage of the provisions of the statute. Higgins *v.* N. Y. and Harlem R. R. Co., 2 Bosw. 133.

The peculiar facts of some cases take them out of the scope of the statute. In Truex *v.* Erie R. R. Co., 4 Lans. 198, the facts were these: Plaintiff, a soldier in the United States Army, was travelling on defendant's road under a special contract made on his behalf by the Government. He was guarding certain prisoners of war confined within the car, and was under orders to remain on the platform during the entire trip. While in that position a jolt occurred by which he was thrown to the ground, and under the circumstances it was held that he had been guilty of no contributory negligence.

A similar conclusion was reached in a case where a plaintiff perceiving an impending collision jumped from his seat and sprang to the platform intending to leap from the train. Buel *v.* N. Y. Central R. R. Co., 31 N. Y. 314. In this case the court said:

"Seeing the danger in which he was placed, the plaintiff was justifiable in seeking to escape injury by leaving the car. His act was not the rash apprehension of danger that did not exist. By the merest chance the passengers in the same car with him, and who did not like him see the approaching collision, and who retained their seats, escaped uninjured. Although doubtless much excited, I do not think there was even an error of judgment as to the course pursued to secure safety. A moment of time earlier would have enabled him to leap from the cars, thus affording a probable chance of escape. But if he misjudged in this respect, the circumstances did not, as matter of law, charge him with negligence or want of ordinary prudence."

In other States somewhat similar conclusions have been reached in the absence of any special statutory provision. In Hemp *v.* W. and M. R. R. Co., 9 Rich. L. 84, the facts were these. Plaintiff was riding on the platform of a car. There were many seats vacant inside the car, and numerous notices warning passengers against riding on the platform. The train was travelling over a rough, unfinished portion of the road, in consequence of

which a jolt occurred injuring the plaintiff. It was nevertheless held that he had not been guilty of contributory negligence per se, and that the question was for the jury.

In Indiana it has been decided that unless the fact of the plaintiff's being on the platform is shown to have actually caused or contributed to the injury done him, he cannot be considered as having been guilty of negligence. Lafayette and Indianapolis R. R. Co. v. Sims, 27 Ind. 59. It is presumed that this is also the law in other States. See Thirteenth and Fifteenth St. Pass Ry. Co., v. Boudron, 2 Am. and Eng. R. R. Cas. 30. Some cases lay down a stricter rule than is indicated above. In Macon and Western R. R. Co. v. Johnson, 38 Ga. 409, where there was shown to have been a notice warning passengers against riding on the platform conspicuously posted in the cars, it was held contributory negligence per se on the part of the plaintiff to disregard the notice, and this, although it did not appear whether or not there were any vacant seats inside the car.

In Hickey v. Boston and Lowell R. R. Co., 14 Allen 429, the facts were these: It was the custom to uncouple the engine and smoking car from the rest of the train on approaching a certain station, so that the former might be switched off on a side track and the remaining passenger cars run slowly to the main station. Passengers in the smoking car were accustomed just prior to the uncoupling to pass from the smoking car over the intervening platform into the other cars with the consent and permission of the employees of the company. Plaintiff crossed the platform as aforesaid, but instead of entering the passenger car where there were seats, remained standing upon the platform after the uncoupling was effected. Owing to the train running off the track he was, while thus standing, injured, but he was held guilty of contributory negligence per se, and was not therefore allowed to recover.

The plaintiff endeavored in this case to show that under the circumstances the platform was not a place of danger. The court, however, ruled out the evidence, holding that the presumption that the platform was a place of danger was not in its nature capable of being rebutted.

In Quinn v. Illinois Cent. R. R. Co., 51 Ill. 495, the plaintiff got upon a train all the seats whereof were occupied. Although there was standing room inside the cars, he placed himself on the platform or steps, holding by a rail. The conductor paused to collect the fare, and while making change certain of the paper money blew away. In attempting to grasp it plaintiff missed his footing and fell, being injured. Under these circumstances the court held that he had clearly been guilty of contributory negligence per se. It may also be observed that in this case there seems to have been little or no evidence of negligence on the part of the defendant.

(2) With relation to horse railroads the law is somewhat different. The New York statute of 1850 already referred to has no application in these cases. Lax v. Forty-Second St. and Grand St. Ferry R. R. Co., 14 Jones and Spencer, 448. The general rule seems to be that if the car is full inside, both seats and standing room being occupied, the question of a passenger's contributory negligence in riding upon the platform is for the jury. If the car be not so full, however, then in most cases such conduct is deemed contributory negligence per se. In Meesel v. Lynn and Boston R. R. Co., 8 Allen, 234, this question is discussed at length by the court. In that case the car being full, the conductor directed the plaintiff to get on the front platform, which he did. While there he was injured through defendant's negligence. It was contended that under the authorities relating to the same question in cases of accidents on steam railroads, plaintiff had been guilty of contributory negligence per se. But the court after reviewing those cases said:

"In the cases above cited it ought to be known by all persons who have anything to do with railroad trains that it is hazardous and inconsistent with

the exertion of ordinary care to leave the seats provided for passengers and stand upon the platform. . . . But in respect to the facts stated in this report there is no such general knowledge as enables the court to say that the plaintiff did not take due care. On the contrary it is well known that the highest speed of a horse railroad car is very moderate, and the driver easily controls it, and stops the car by means of his voice, his reins and his brake. In turning around an angle from one street to another passengers are not required to expect that he will drive at a rapid pace; but on the contrary might reasonably expect a careful driver to slacken his speed. The seats inside the car are not the only places where the managers of the cars expect passengers to remain; for it is notorious that they stop habitually to receive passengers to stand inside until the car is full, and then to stand upon the platforms till they are full, and continue to stop and receive them even after there is no place for them to stand except on the steps of the platforms. Neither the officers of these corporations, nor the managers of the cars, nor the travelling public seem to regard this practice as hazardous, nor does experience thus far seem to require that it should be restrained upon the ground of danger. There is, therefore, no basis upon which the court can decide on the evidence reported, that the plaintiff did not use ordinary care."

The question was therefore held to have been rightly submitted to the jury. See also Augusta and Summerville R. R. Co. v. Renz, 55 Ga. 126. A number of cases in New York sustain this doctrine. In Spooner v. Brooklyn City R. R. Co., 54 N. Y. 230, the plaintiff took a place on the steps of a large sleigh run by defendant, the seats of which were all full, and while in that position paid his fare. Being knocked off by a collision with a passing vehicle he brought suit, and the question of his contributory negligence was held a proper one for a jury. To the same effect is Germantown Pass. Ry. Co. v. Walling, 2 Am. and Eng. Railway Cases, 20, and note also Hardencamp v. Second Ave. R. R. Co., 1 Sweeny, 490.

In Ginna v. Second Ave. R. R. Co., 67 N. Y. 596, it is said that, when a street car is so crowded that although it may not be physically impossible to enter it, yet if this cannot be done without great and unreasonable discomfort a passenger may with the concurrence of the conductor expressed by receiving the usual fare remain upon the platform without being guilty of contributory negligence per se; whether or not he is so guilty is for the jury.

In some cases it has been held that even when the car is not full the question is equally one for the jury. Maguire v. Middlesex R. R. Co., 115 Mass. 239; Nolan v. Brooklyn City, and Newtown R. R. Co., 25 Alb. L. J. 72; Scigel v. Eisen, 41 Cal. 109.

In some cases a passenger will be held to be guilty of no contributory negligence whatever in riding upon the platform. In Sheridan v. Brooklyn and Newtown R. R. Co., 36 N. Y. 39, the facts were these: Plaintiff, who was a young lad seated in the car of the company, defendant, was bidden by the conductor to rise and yield his seat to adult passengers. He did so and was forced by the crowd in the car upon the front platform. While there the shoving of the other passengers pushed him off and he sustained injuries for which he brought suit. In this case the plaintiff was under the circumstances held to have been guilty of no contributory negligence. In Clark v. Eighth Ave. R. R. Co., 36 N. Y. 135, a similar conclusion was reached, where the evidence showed that plaintiff was at the time of the accident riding on the front platform of a very full car, and that while standing there he had paid his fare to the conductor. See also Burns v. Bellefontaine R. R. Co., 50 Mo. 139, where the facts were similar, except that there it appeared that the employees of the company had expressly permitted plaintiff to ride on the platform.

There may, however, be such facts in the case as will make the plaintiff's conduct amount to contributory negligence per se even though the car be

completely full inside, as, for example, if he fails to take hold of an iron bar or stanchion which would serve to steady him. Ginna v. Second Ave. R. R. Co., 67 N. Y. 596. It seems too that where the Company have posted notices in their cars forbidding passengers to get on or off the front platforms it is contributory negligence per se on the part of any person having notice of this regulation to violate it. Baltimore City Passenger Ry. Co. v. Wilkinson, 30 Md. 224. In Wood v. Central Park R. R. Co., 11 Abb. Pr. N. S. 411. the facts were these: Plaintiff on a snowy and icy day got upon the rear platform of a car. There was standing room inside but there were no seats. Plaintiff retained his position on the platform by taking hold of an iron bar and while standing thus paid his fare. There were large lumps of ice at intervals along the track over when the car bumped. One of these bumps dislodged plaintiff from his hold. He fell and was injured. Under the circumstances he was held guilty of contributory negligence per se and was not allowed to recover.

Of course if the fact of the plaintiff's being on the platform has no casual connection with the injury done him, all question of his contributory negligence in being there is disregarded. Thirteenth and Fifteenth St. Passenger Ry. Co. v. Boudron, 2 Am. and Eng. R. R. Cas. 30.

EMIL KATZENSTEIN

v.

RALEIGH AND GASTON R. R. CO.

(84 *N. Carolina Reports*, 688. *January Term*, 1881.)

In an action against a railroad company, where it was in evidence that S., the regular agent of the defendant at a certain depot, lived three miles from the depot, and that T. lived at the depot for two years prior to the bringing of the action, and discharged the duties of agent in receiving and forwarding freight, selling tickets, etc., all of which was done in the name of S. and with the knowledge and acquiescence of defendant; it was *held*, that T. was the agent of defendant, and that defendant was bound by any act of his within the scope of the authority impliedly given.

The penalty against a railroad company for failure to forward freight under ch. 240, § 2, Laws 1874–5, is not given by article 9, § 5 of the constitution to the county school fund.

The said statute is not in violation of the Constitution of the United States. Art. 1, § 10.

An action to recover the penalty under the statute is an action ex contractu, and when the sum demanded does not exceed two hundred dollars a justice of the peace has jurisdiction.

(Branch v. R. R. Co., 77 N. C. 347; Lea v. Pearce, 68 N. C. 76; Parsley v. Nicholson, 65 N. C. 207; Wilmington v. Davis, 63 N. C. 582; Edenton v. Wool, 65 N. C. 379, cited and approved.)

CIVIL action tried on appeal from a justice's court at Fall Term, 1880, of Warren Superior Court, before Graves, J.

The action was instituted by the plaintiff in the justice's court, to recover the sum of one hundred and fifty dollars, due by penalty given by the act of 1875, ch. 240, § 2, which reads as follows: "It

shall be unlawful for any railroad company operating in this state to allow any freight they may receive for shipment to remain unshipped for more than five days, unless otherwise agreed between the railroad company and the shipper, and any company violating this section shall forfeit and pay the sum of twenty-five dollars for each day said freight remains unshipped, to any person suing for the same."

The plaintiff complained, that on the 28th day of November, 1878, he delivered to the defendant company at their depot in Warren County (Warrenton), for shipment, the following described freight, to wit, one package containing hides and leather, weighing about five hundred and forty pounds, which was then received by them for shipment, and the defendant did unlawfully and negligently allow said freight to remain unshipped, at their said depot in said county from the said 28th day of November, 1878, until the 9th day of December, 1878, being more than five days from the day it was received by them for shipment, until it was shipped, to wit, eleven days; and demanded judgment against the defendant for the penalty thus incurred.

It was shown on the trial, that one O. P. Shell was agent of the defendant company at Warrenton depot, that he lived at Warrenton, three miles from the depot, and ran a hack between the points.

The plaintiff offered in evidence a receipt for the hides alleged to have been delivered to the defendant for shipment, which is as follows:

RALEIGH AND GASTON R. R. Co,
November 28, 1878.

Received of E. Katzenstein, one bundle of hides, 540 pounds, in apparent good order, marked Edwards & B., to be sent to Boston, Mass.

(Signed) O. P. SHELL, Agent.

The admission of the receipt was objected to, because it was not signed by Shell, but by one Terrel for him. It was shown that at the depot, for two years, Terrel had attended to the business of receiving and forwarding freight for Shell, and issuing passenger tickets, and all the business was done in the name of Shell, as agent, and at his request; that he received his compensation from the agent, Shell, who received his pay from the company; that he received the hides from the plaintiff on the day the receipt bears date; that he put them in defendant's warehouse, gave plaintiff the receipt offered in evidence, and afterwards shipped them on defendant's cars; that he was in the habit of telegraphing to the superintendent at Raleigh, in Shell's name, for cars to carry off freight from that depot which were sent in answer to these telegrams; that the superintendent of the road was frequently at that depot while Terrel was attending to the duties of the office; that on one occasion on the cars, the superintendent requested the plain-

tiff to notify him if Terrel failed to ship off his goods promptly. The objection of the defendant was overruled and the receipt admitted in evidence, to which the defendant excepted.

It was also in evidence that the hides remained in the warehouse of the defendant eleven days from the date of this dealing, and there was no agreement that they should not be shipped immediately. It was not the custom of the company to receive freight in advance, and none was demanded in this case, but was paid at the point of destination.

There were several points of law raised and urged by the defendant's counsel on the trial:

1. That there was no evidence to go to the jury of the delivery of the bale of hides to the defendant; that it was not shown that Terrel who signed the receipt was the agent of the company, or had any authority to bind it in any way; that Shell was the agent of the company, and had no authority to appoint a sub-agent; that Terrel was Shell's agent, and not the agent of the company and was not known or recognized by the company as its agent.

2. That under the constitution (art. 9, § 5) all penalties, forfeitures, etc., are given to the county school fund, and it is provided therein, that they shall belong to and remain in the several counties, and shall be faithfully appropriated to maintaining and establishing free public schools in the several counties in the state, and that the plaintiff could not recover in this action in his own name.

3. That the act of the general assembly giving this penalty, (laws of 1874–'75, ch. 240, § 2) under which this action was brought, was in violation of article one, section ten of the constitution of the United States, which provides that no state shall pass any law impairing the obligation of contracts, and was therefore unconstitutional and void.

On the first point, the court charged the jury that there was evidence to be considered by them that Terrel was the agent of the defendant company, and if they should so find that he was the company's agent, they would find that plaintiff's goods were delivered to defendant company, at the date of the receipt for the purpose stated in it.

On the second point, the court charged the jury, the penalty did not go to the common school fund, and the plaintiff had the right to sue for and recover it, in his own name, if they found the other facts for the plaintiff. Defendant excepted.

On the third point, the court charged the jury that the act of 1874–'75 was not unconstitutional. Defendant excepted.

The jury found a verdict for the plaintiff, and from judgment thereon the defendant appealed.

Messrs. Gilliam and Gatling, for plaintiff.

Mr. J. B. Batchelor, for defendant.

ASHE, J.—As to the exception taken to the admission of the receipt given by Terrel in the name of Shell, we concur with the ruling of his Honor. There was abundant proof to go to the jury that Terrel was the agent of the defendant. An agent is one who is employed by another to do some act or transact some business on his account. Story on Agency, § 3; Parsons on Contracts, pp. 39 et seq. It is not necessary to show the appointment of an agent; his agency may be inferred from the relations of the parties, and the nature of the employment. Bouvier's Law Dict., 83.

It was in evidence that Shell was the regularly appointed agent of defendant company at their Warrenton depot, but that he lived three miles away from the depot, and was occupied in driving a hack from Warrenton to the depot. Terrel lived at the depot, and for two years before this action was commenced, had attended to the business of the office at that point, and had discharged the duties of agent in receiving and forwarding goods, selling tickets, sending telegrams to the superintendent, ordering cars to be sent, etc., all of which was done in the name of Shell, with the knowledge and acquiescence of the defendant, for it is impossible that he should have discharged all of these duties pertaining to the office of agent for such a length of time, without their knowledge and approval. If he was not their agent, and had no right to bind them by his acts, then the defendant company had been shipping freight and doing other business as carriers for two years without responsibility. If he was not their agent, why did the superintendent tell the plaintiff to notify him if Terrel did not ship his goods promptly? It matters not whether Terrel signed the receipt with Shell's name, or that of the company, or whether he was paid for his services by the one or the other; if he transacted the business of the company, and performed the duties of an agent on their account, with their knowledge, or with their acquiescence, he was their agent, and they were bound by any act of his within the scope of the authority impliedly given.

As to the second exception of the defendant, we think it was as groundless as that taken to the agency of Terrel. The action was properly brought in the name of the plaintiff. Article nine, section five of the Constitution does give to the county school fund all moneys, stocks, bonds, and other property belonging to a county, the net proceeds of the sale of estrays, the clear proceeds of all penalties and forfeitures, and of all fines collected in the several counties, for any breach of the penal or military laws of the State; but there is a distinction between those penalties that accrue to the State and those that are given to the person aggrieved, or such as may sue for the same, and no doubt this distinction was in the contemplation of the framers of the Constitution when they adopted that section. There are many penalties given against officers and others whom no one is authorized to sue, and those, when collected.

belong to the State. It must be this class of penalties that is given to the county school fund. If it was intended by the Constitution to give them all penalties, as well those that belong to the State as those that are given to the party aggrieved or common informer, then the statutes giving penalties in the both cases would become a "dead letter;" for there might be now and then found a person mad enough, but none so patriotic and unselfish as to bring an action for a penalty, and incur responsibility for costs, when he knew the fruits of his suit would fall into other hands. If the penalty sought to be recovered in this action belongs to the county school fund, then all penalties must go the same way, and hereafter the plaintiff who amerces a sheriff in the sum of one hundred dollars for not serving his process, will collect it for the benefit of the school fund of his county. That cannot be the meaning of the Constitution.

As to the third exception we need only refer to the case of French v. Wilmington and Weldon R. R. Co., 77 N. C. 347, where this court expressly decided that the section in question of the act of 1874–75 was not in violation of the Constitution of the United States.

In this court the defendant, as he had the right to do, raised an objection to the jurisdiction of the Justice's Court, and insisted that even if the plaintiff had the right to maintain this action in his own name, the Justice of the Peace had no jurisdiction of the action; for the Constitution defines and prescribes the jurisdiction of the Justice of the Peace by providing that "the several Justices of the Peace shall have jurisdiction of civil actions wherein the sum demanded shall not exceed the sum of two hundred dollars, and wherein the title to real estate shall not be in controversy (Art. IV., § 27); that to give him jurisdiction it must not only be shown that it is a civil action, but that it was founded on contract. That is true; but then is a penalty a contract, or is it in the nature of a contract?

When this court has found itself "afloat" upon the "uncertain sea" of code interpretation, it has necessarily and very properly had recourse to the "old landmarks" established under the former system of pleading, as guides through the mist that but too frequently envelopes the practice under the provisions of the code. For although the distinction between actions of law and suits in equity and the forms of actions are abolished, and there is in this State but one form of action, it is only the name and form of the action that are abolished; the essential principles are preserved. Under the present system, when the plaintiff sets forth in his complaint, as he is required to do, a plain and concise statement of the facts constituting his cause of action, the principles that govern his cause of action under the common law and equity pleadings are still applicable, as indicating the nature of the grievance, the evidence required, and the means of relief, and the action is just

as much an action of trespass, detinue, or debt, as if it had been called so in the pleadings. Bliss on Code Pleading, 7 and 8; Lee *v.* Pearce, 68 N. C. 76; Parsley *v.* Nicholson, 65 N. C. 207.

In common law pleadings the action of debt was the remedy to recover a debt eo nomine and in numero; it was founded upon contract, and in this respect differed from assumpsit, which was always founded upon a promise. Simonton *v.* Borrel, 21 Wendell, 362.

The action of debt then, thus founded upon contract, was an appropriate remedy upon all legal liabilities upon simple contracts, whether written or unwritten; upon notes, whether with or without seals; and upon statutes by a party grieved, or by a common informer; whenever the demand was for a sum certain or was capable of being readily reduced to a certainty. 1 Chitty's Pleading, 123. As for example a penalty imposed by a statute, though the amount is uncertain, and is to be fixed by the court between five and fifty dollars. Rockwell *v.* Ohio, 11 Ohio, 130.

But why was debt an action sounding in contract the proper remedy for a penalty given by a State? The learned jurists whose cumulative wisdom formed the common law system of pleading, which has been characterized by some of its eulogists as the perfection of reason, must have had good grounds for classifying penalties among those subjects of action denominated ex contractu as distinguished from torts. The only explanation we have been able in our researches to meet with on this subject, is to be found in 3 Blackstone's Commentaries, 160. That learned judge and commentator says: "There are some contracts implied by law. Of this nature are, first, such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party. And thus it is that every person is bound and hath agreed to pay such particular sums of money as are charged on him by the sentence or assessed by the interpretation of the law. For it is a part of the original contract entered into by all mankind, who partake the benefit of society, to submit in all points to the municipal constitutions and local ordinances of that State, of which each individual is a member. Whatever, therefore, the law orders one to pay, that becomes instantly a debt which he hath beforehand contracted to discharge."

In the case of Wilmington *v.* Davis, 63 N. C. 582, Judge Rodman held that a Justice of the Peace had jurisdiction of a penalty under two hundred dollars; but it is objected that that was a dictum. Be it so, yet it was an authority from a very respectable source, which was afterwards cited and approved in the case of the Town of Edenton *v.* Wool, 65 N. C. 379, where this court held that an action for a penalty for a breach of a town ordinance was technically a civil action arising out of contract.

There is no error. The judgment must be affirmed.

No error.

Affirmed.

W. W. Pegram

v.

Charlotte, Columbia and Augusta R. R. Co.

84 *N. C. Reports*, 698. *January Term*, 1881.

Plaintiff, station agent of a railroad company, sues the company in damages for breach of an alleged contract in failing to furnish a train for an excursion. Upon correspondence had the company supposed the train was intended for a third party and agreed to supply it on certain terms, but afterwards refused on discovering that plaintiff was attempting to procure it for his own benefit. *Held*, that plaintiff could not from his fiduciary relation towards the company enter into a binding contract with it for such purpose, unless it agreed thereto after being fully advised of all the circumstances.

(Brunhild *v.* Freeman, 77 N. C. 138; Pendleton *v.* Jones, 83 N. C. 249, cited and approved.)

Civil action tried at Fall Term, 1880, of Mecklenburg Superior Court, before Seymour, J.

Verdict and judgment for plaintiff, appeal by defendant.

Messrs. Shipp & Bailey for plaintiff.

Messrs. Wilson & Son for defendant.

Smith, C. J.—The action is for damages for breach of a contract alleged to have been entered into by the defendant for the hire of two excursion trains to be run over the railroad, one between Charlotte and Augusta, the other between Charlotte and Columbia, in the month of May, 1875. The answer explains the correspondence between the plaintiff and the General Superintendent of the company, in whom was vested authority to contract for the running of trains over the road, denies the existence of the alleged contract, and insists that, if made, it was procured through circumvention and fraud practised by the plaintiff, and is void. No specific questions of fact growing out of the opposing allegations were framed, but the entire controversy was submitted to the jury, who find "the issues in favor of the plaintiff, and assess his damages at seven hundred and seventy-five dollars." On the trial the plaintiff, testifying for himself, stated that during the year 1875 he was station agent for the defendant company at Charlotte, and had the supervision of the depot and business at that place; that he addressed to the general passenger and freight agent of the company at Columbia, two letters of same date and in the following words:

[1] C., C. & A. R. R., Charlotte Agency,
March 1st, 1875.

A. Pope, Esq., G. F. A., Columbia:

"Ferry Morehead, colored, wants to know price of an excursion train of five coaches and one baggage car, Augusta to Charlotte

and back; leaving Augusta 19th May, and returning leave Charlotte 9 A.M., 21st May, 1875.

"Respectfully,

"W. W. PEGRAM, Agent."

[2] "Please let me know the lowest price for engine, five coaches and baggage car, Columbia to Charlotte and back, with privilege of running between Charlotte and the fair grounds during the day, leaving Columbia five or six o'clock A.M., 20th May, and returning leave Charlotte 12.30 A.M., 21st of May." (Written at Charlotte Agency and signed by W. W. Pegram.)

That in reply the said Pope wrote to the plaintiff that the trains from Augusta to Charlotte could be forwarded for $400, and from Charlotte to Columbia for $250; that the plaintiff, on March 18th, sent a telegraphic message to Pope that he thought both trains would be taken, and asking him not to make any other arrangement until he should hear further, and soon after he wrote to Pope in the following terms from the Charlotte Agency, under date of March 25th, 1875:

"Both trains of which I wrote you about 1st March have been taken. You will please arrange accordingly. The one for Columbia should be made up of the very best cars, as it is intended for whites entirely." (Signed by W. W. Pegram, Agent.)

This was the evidence offered in support of the contract, and the plaintiff further testified that it was made in contemplation of the intended commemoration of the centennial of the Mecklenburg declaration of May 20, which was expected to attract, and did in fact attract large numbers to Charlotte, and from the refusal to supply the trains the plaintiff suffered a large loss in profits. The testimony of the General Superintendent, who had authority to enter into such arrangements, was in substance that he was wholly ignorant of the approaching celebration, and of the increased travel in consequence about that date, and no information was given him by the plaintiff or others, and that as soon as he discovered that the plaintiff was attempting to procure trains for his own use, he promptly refused to let them go. A series of instructions was asked for the appellant, unnecessarily to be set out in detail, but which are embodied in these propositions:

1. The plaintiff's agency and its consequent fiduciary obligations incapacitated him from making a contract with the company, creating adverse relations between them within the scope of such agency.

2. A contract thus obtained without a full disclosure of all matters affecting the interests of his principal and known to the agent would be fraudulent and void.

3. The plaintiff was bound to look after and promote the interests of the company, and could not without its full knowledge of

all the material facts by means of the attempted contract advance his own at the expense and to the injury of his employer.

4. The burden of showing that the company possessed the necessary information and his own good faith devolved upon the plaintiff.

5. There was no evidence the company had such information.

6. The measure of damages in case of recovery is the excess above the contract price of the earnings of the road in its ordinary runnings, and not the extraordinary occasion to which the contract had reference.

The instructions were not given and in their place the following: The plaintiff was bound to communicate to the superior agent with whom he was dealing all the information he possessed which was material to the interests of their common principal in determining upon the proposed contract, and that he was acting for himself; and he must have acted with the utmost good faith of which proof must come from him. It was not necessary, however, for him to give information of facts which he might reasonably assume to be known to all and were known to his superior agent—as for illustration, that the fourth day of July is a national holiday. The Mecklenburg celebration is not of the kind of which notice is presumed. If this centennial celebration was of such general notoriety as to be known to Pope or the general agents of the company, having charge of such contracts, and was, in fact, so known to them, then the failure of the plaintiff to convey this information would not defeat his action. This he must show. The defendant, if uninformed by the plaintiff or otherwise of the contemplated proceedings in May and the plaintiff at the date of the contract was acting as its agent, could terminate it and would not become liable. The damages, if any, are such as may be reasonably supposed to have been contemplated by the parties at the time as the probable results of the breach of the contract.

The correspondence between the plaintiff, the subordinate, and Pope, the superior agent, both in the service of a common principal, furnishes the evidence of the contract on which the action is based. It does not show upon its face that the plaintiff was seeking to enter into a personal contract for his own individual advantage with his employer. His first letter is one of inquiry for Ferry Morehead who "wants to know price of excursion train," has the usual agency heading and is signed by himself as "agent." The second, bearing the same date, and the same general impress, except that the signature is without the "agency," would reasonably be associated with the other in its purposes and be interpreted in the same way. In neither is there any indication of a direct personal interest in the subject of the inquiry on the part of the writer. They would both most naturally be understood as a communication between the two agents of the same company, the one

asking and the other furnishing information for some outside party. The telegraphic message is in keeping with the letters—the plaintiff saying to his superior on the 18th of March that "he thought that both trains would be taken," and asking that no other arrangement be made until he heard further—language implying that the acceptance of the proposition depended on the will of another, not on that of the writer. The letter of acceptance is of similar import, declaring that both trains have been taken, as if the act had been consummated between himself and another, and he was now communicating the fact to the superior agent. Nowhere does the plaintiff profess or appear to be acting for himself and for his personal benefit, and so the matter seems to have been understood by Pope, who testifies that as soon as it came to his knowledge that the centennial celebration was to come off and that the "plaintiff had procured a train for his own use and benefit . . . he refused to allow the plaintiff to have the trains." The several inter-communications do not disclose any common understanding—that aggregatio mentium—the essential element in a valid agreement. Pope seems to have received the plaintiff's messages (and this interpretation is warranted by the terms used and their relations as employees in the same general service) as conveyed in the interest of the company, and not for the advancement of his own profit; and his undiscovered intention, even in the absence of any third party, cannot constitute a contract with his principal any more than with Pope himself. The existence of a contract depends upon a mutual agreement, and its binding force results not from what either intended but what both concurred in. Brunhild *v.* Freeman, 77 N. C. 128; Pendleton *v.* Jones, 82 N. C. 249. The point is not distinctly presented in the instructions asked and refused, but it is in our opinion substantially involved in the first in connection with the others, that the plaintiff could not from his fiduciary relations towards the company enter into a binding contract with it. This was in effect a request that the judge charge the jury that no legal contract was created between the plaintiff and his employer, and there was error in refusing to so charge. The law, in harmony with sound morals, refuses its sanction to any measure, though assuming the form of contract, procured by a fiduciary from his principal in violation of the trusts reposed in him, and to the injury of the latter, at least unless such principal is fully advised of all the circumstances and knows at the time that he is dealing with one, then divested of his agency, and acting in an adversary and independent capacity. The cases and authorities cited for the appellant fully support this doctrine. Story Ag., § 211 et seq.; Ringo *v.* Binns, 10 Peters, 269; Dunn *v.* English, 10 Moak, 846. For the error pointed out there must be a new trial.

Error. Venire de novo.

The Pueblo and Arkansas Valley R. R. Co.

v.

Taylor, et al.

(*Advance Case, Colorado. December Term*, 1881.)

When the public interest is brought in conflict with the private interests of a railroad company, or with the interests of private individuals with whom such company may deal, such private interests must yield to that of the public. A contract resting in part upon an illegal consideration is totally void.

So, when the defendants executed to the plaintiff railroad company a bond, one of the conditions of which was that said company was not to lay down a side track at a certain town through which the railroad passed, this condition is construed to be a consideration inseverable from the other considerations upon which the entire contract rested, and such consideration being held illegal as against public policy, and void, the contract will not be enforced, nor a recovery had upon breach thereof.

In 1878 the defendants, citizens of the town of Trinidad, Colorado, entered into a bonded agreement with the plaintiff, the Pueblo and Arkansas Valley R. R. Co., whereby certain tracts of real estate (supposed to be valuable coal lands) were to be conveyed to the company as an inducement to build its road from La Junta to Trinidad. It was also agreed to give the company right of way through the county, to donate a tract of land for depot grounds at Trinidad, and to pay one half the taxes assessed by the county against the road for the period of five years. The consideration for this obligation was that the company should build its road from La Junta to Trinidad within a specified time, and as nominal conditions of the bond it was further provided that a depot should be located at Trinidad, and workshops for the company erected there if any were built in that county, and also that a side-track should not be laid down or built at the town of El Moro, a rival town, through which the road was to pass six miles before reaching Trinidad. The company built its road within the specified time, the right of way and depot grounds were granted according to agreement, but subsequently, after the road was extended into New Mexico, and became a part of the main line of the Atchison, Topeka and Sante Fé R. R. to the Pacific, the defendants refused to make the other grants and to pay the taxes, whereupon suit was brought to recover the penalty of the bond. There is no averment as to whether up to the time of bringing the suit the plaintiff had complied with the condition respecting the side-track at El Moro or not. The defendants demurred to the complaint, and among other grounds, contended that the condition as to the side-track at El Moro was illegal, and vitiated the contract so as to avoid a re-

covery. The demurrer was sustained in the court below, and the case was taken on writ of error to the Supreme Court, wherein the judgment of the court below was affirmed.

Omitting the recital of the bond and complaint, the opinion is as follows:

STONE, J.—Several objections are made and argued by counsel for the defendants against the validity of the contract, but we need consider only that one which we regard as decisive of the case.

It is contended by defendants that the condition providing that the railroad company was not to build a side-track at the town of El Moro was illegal, and therefore vitiated the contract, and that no recovery can in consequence be had upon the bond for its performance on the part of defendants.

On the other hand, it is contended that even if this condition is void, a recovery can, nevertheless, be had upon the other conditions which are good.

We are thus led to examine whether, 1st, the condition in question is valid and binding, and 2d, whether, if invalid, it so far impairs the entire contract as to preclude a recovery upon the bond.

The first of these questions is an important one, but is not without precedent. Cases involving the same principle have received the careful consideration of numerous courts, and upon settled authority this agreement or condition not to build the side track in question must be pronounced illegal as against public policy. Precisely what public policy is in any given case may frequently be a matter of contention and its application a subject of dispute. The strict meaning of the expression, "has never," says Mr. Story, in his work on contracts (Sec. 546), "been defined by the courts, but has been left loose and free of definition, in the same manner as fraud. This rule, however, may be simply laid down, that whenever any contract conflicts with the morals of the times, and contravenes any established interest of society, it is void as being against public policy."

Railroad companies are held to be quasi public corporations and agencies, their directors acting in the double capacity as agents for the company and the trustees for the public, clothed with an important public trust. These roads subserve public purposes to such an extent that the public may impose upon itself the burden of taxation to aid in their construction (St. Joseph & Denver City R. R. v. Ryan, 11 Kan. 608), and the lawful exercise of the right of eminent domain in the taking of private property for the purpose of their construction is put solely upon the ground of public use. When, therefore, the public interests are brought in conflict with the private interests of the company, or of private individuals with whom such companies deal, such private interests must yield to those of the public. It logically follows that the public has a right to say that such companies shall not be permitted to make any con-

tract which would prevent them from accommodating the public, where entitled to it, in the matter of transportation and travel.

In the case of the St. Joseph and Denver City R. R. Co. v. Ryan, 11 Kansas, 609, which arose when a contract containing a stipulation that the railroad company would not have or use any other depot within three miles of the depot agreed to be established by the contract, the court says:

"Railroad companies are public agencies, and perform a public duty. They are agencies created by the public with certain privileges, and subject to certain obligations. A contract that they will not discharge, or by which they cannot discharge those obligations, is a breach of that public duty, and cannot be enforced. They are under obligations to use the utmost human foresight and sagacity in the construction of their roads to prevent accidents thereon. A contract that they will not use such sagacity and foresight could not be upheld. They are under obligations to employ skilful and competent engineers and other competent employees to superintend and take care of the running of their trains. A contract that they will not employ such agents and servants is certainly void. They are bound to furnish reasonable facilities for the transportation of freight and passengers, both as to quantity and quality of cars and coaches, and the number of trains, and a contract not to furnish such facilities will not be tolerated. . . . Upon the same principle it is the duty of a railway company to furnish reasonable depot facilities. The number and location of the depots so as to constitute reasonable depot facilities vary with the changes and amount of population and business. A contract to leave a certain distance along the line of the road destitute of depots is a contravention of this duty."

In addition to the foregoing the same doctrine is laid down in the following, among other cases: Marsh v. Fort Pierre & Northwestern R. R. Co., 64 Illinois, 415; St. Louis, Jacksonville & Chicago R. R. Co. v. Mathers, 71 Illinois, 593; Pacific R. R. Co. v. Seeley, 45 Missouri, 212; Fuller v. Dame, 18 Pick. 472; Holladay v. Patterson, 5 Oregon, 177; Pierce on Railroads, page 513.

Upon both principle and authority, we think it beyond serious question that the condition in this contract, whereby it was sought to prevent a neighboring town through which the railroad passed from having the facilities of even a side track, and to prevent the railroad company from the exercise of discretion in providing such facilities for the public, is illegal and void, by reason of its clear contravention of the public interests, and the duty of such company in their relations to the public.

Second—Does this void condition, which was one to be performed by the plaintiff, operate to prevent a recovery against the defendants upon breach of the conditions to be performed by the latter?

This question depends upon whether the void condition was any part of the consideration for the undertaking of the defendants, and if, being such, whether it can be regarded as so far an independent promise as to be separable, and to be regarded both as a promise on the one side, and as a consideration on the other side, for it is a general rule of the law of contracts that if the consideration, or any part of it, is illegal, no promise based upon such illegal consideration can be enforced. Bishop on Contracts, section 471; 1 Parsons on Contracts, sections 11 and 12; 2 Chitty on Contracts (eleventh edition), page 973.

It is contended by counsel for plaintiff that "the bond contains no promise to that effect" (not to build a side track to El Moro), ,'to be performed by the plaintiff; the language is that of a condition, upon the violation of which the liability of the defendants is to cease. For a good and lawful consideration the defendants cov enanted to do certain things, which made a contract complete in itself, but for their own protection during the future lifetime of the obligation, they impose upon the plaintiff certain conditions and say that when these happen their undertaking is to be cancelled."

This argument is plausible, and might perhaps be regarded sound if we could say that this condition did not constitute a part of the consideration for the covenant of the defendants. It is true that there are many cases where when a contract is for the doing of two or more things which are entirely distinct, and one of them is prohibited by law, and the other legal, such illegality of the one stipulation cannot be set up as a bar to an action for a breach of one of the valid stipulations. Such a case is that of the Erie Ry. Co. *v.* Union L. E. Co., 35 N. J. L. 240, which is cited by counsel for defendants; but there the suit was for a breach of the good promises only which were made upon a good consideration, and which were so distinct from the illegal promises as to be severable.

A distinction must be taken between the cases in which the consideration is illegal in part, and those in which the promises founded on the consideration are illegal in part. "If any part of a consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or an illegal promise, although he may have connected with this act or promise one which is legal. But if one gives a good and valid consideration, and thereupon another promises to do two things, one legal and the other illegal, he shall be held to do that which is legal, unless the two are so mingled and bound together that they cannot be separated; in which case the whole promise is void." 1 Parsons on Contracts, 457.

Now, in the case before us, the contract is made up of mutual promises by the plaintiff on the one side and the defendants on the other. In all such cases the promises on each side become the consideration for the promises on the opposite side. True, the void con-

dition in this case is not expressed to be a promise on the part of plaintiff, nor a consideration moving to the defendants, but such promise and consideration is certainly implied when we take into view the entire contract, the nature of the transaction, and the evident intent of the parties. A contract is to be construed by reference to all its parts and provisions, and the nature of the transaction which forms its subject-matter; and so the mere form of words used, and the relative order and position of promises, considerations, covenants and conditions recited in the instrument, are to be construed and are to govern according to the purpose and intent of the parties from a rational interpretation of the whole contract. 2 Parson's Contracts, secs. 511, 525–9. Bishop on Contracts, secs. 586–9.

Counsel for defendants cite Metcalf on Contracts as authority for the proposition that "if any part of the condition of a bond be against law, it is void for that part, and good for the rest;" but this proposition, stated thus nakedly, is misleading, for it is based on the case of Chamberlain *v.* Goldsmith, 2 Brownlow, 280, cited in support of the text, in which case the "condition" referred to was a covenant on the part of the obligor, and involves only the rule applicable to a severable illegal promise or condition, the same as the leading case of Chesman *v.* Nainby, 2 Strange, 739, and 2 Ld. Raymond, 1456, where the breach was assigned upon the good condition only. Whether a promise is to be construed as a covenant or a condition is to be determined by its character. Pierce on Railroads, 135; Blanchard *v.* Detroit, etc., R. R. Co., 31 Mich. 49.

No particular form of words is necessary to create a covenant. Any words will be effectual for that purpose, which show that the party sought to be charged as a covenanter intended to agree to do or to refrain from doing something in which the other party had an interest. Livingstone *v.* Stickles, 8 Paige, 403; 1 Parsons on Contracts, 511.

It is to be observed that nothing whatever to be done on the part of the plaintiff company is anywhere in the contract expressly stated to be a consideration by that term; what is expressed as for a consideration, in the proper locus of the instrument for the insertion of the consideration clause, to wit: The building of the road from La Junta to Trinidad within a time specified is named a "condition," but cannot be regarded any more or less a condition than those stipulations recited in the latter part of the contract respecting the failure of the railroad company to keep its principal place of business for Las Animas county at the town of Trinidad, and the failure to keep its repair and machine shops, if built in said county, within a mile of said town, which stipulations are inserted as conditions in form, defeasant of the bond. And in connection with these latter conditions is recited that one providing against building a side track at El Moro. Now, it cannot be said

that the condition first named is not an implied promise by the plaintiff to build its road between the points named within the specified time, nor that as such promise it did not become a part of the consideration for the engagement of the defendants. Nor can it be said that the conditions last named in the contract were not intended by the parties, and are not to be treated as like implied promises on the part of the plaintiff, that it would establish and keep its principal place of business for that county at Trinidad, and would locate and keep within one mile of that place its machine shops erected in that county (for the defendants engaged to furnish forty acres of ground for this and depot purposes), and that it would not build a side track to El Moro.

These several conditions, then, all stand upon the same footing as to their legal character in the instrument; that is to say, while one is inserted in one part of the instrument, and the others in a different guise in another part, yet they alike import promises of things to be done, and not to be done, and as such they together constitute and operate as the consideration for the entire obligation of the defendants.

Considering the entire contract, the parties thereto, and the nature of the transaction, it seems unreasonable to conclude that any one of these conditions formed no part of the consideration moving to the defendants as obligors of the bond, or that the void condition was any less a consideration than any other one of them.

And where an illegal condition or promise on the one side is a part of the consideration for the entire obligation on the other side, it is owing to the impossibility of determining the weight or extent of such portion of the consideration which moved to induce the engagement thereupon, that such void promise or consideration is held to be unseverable and avoids the whole contract.

We agree that where an illegal promise has been exacted from, or an illegal condition imposed upon, the plaintiff by the defendants for the benefit of the latter, or to the injury of the public, or by reason of enmity to third parties, such a defence comes with very ill grace from the mouths of the defendants, but where no element of fraud, deception or mistake appears, and both parties voluntarily and with full knowledge and understanding of all the terms and conditions enter into a contract such as to place both parties in pari delicto, the law will not aid either party to enforce the contract or to relieve from the effect of the performance thereof, but leaves them just where it finds them. In some cases, under the application of this rule, a defendant may gain a pecuniary benefit by reason of his own wrong doing, or one in which he has equally participated, but it is not for the sake of the defendant that his objection to his own illegal contract is ever allowed. In the language of Lord Mansfield: "It is founded in general principles of policy which the defendant has the advantage of, contrary to the

real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: Ex dolo malo non oritor actio. No court will lend its aid to one who founds his cause of action upon an immoral or illegal act. If, from the plaintiff's own showing or otherwise, the cause of action appear to arise ex turpi causa, or the transgression of a positive law of the country, then the court says he has no right to be assisted. It is upon that ground that the court goes, not for the sake of the defendant, but because they will not lend their aid to the plaintiff. So, if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it, for where both are equally in fault, potior est conditio defendentis.

In the case of the St. J. & D. C. R. R. Co. *v.* Ryan, 11 Kansas, 602, land was conveyed by Ryan to the railway company, on condition, among others, that a depot should be located and kept at a certain place, and that no other depot should be established or used within three miles of said place; and it was held that no recovery could be had for a violation of the condition not to build another depot within the prescribed limits.

A similar case is that of the St. Louis and Chicago R. R. Co. *v.* Mathers, 71 Ill. 592, where the railway company accepted a donation in trust of 200 lots on condition that they would not establish a depot or station within three miles of certain towns at which depots were agreed to be established. A bill was filed, setting up a violation of this condition, and praying a decree for re-conveyance of the lots, to which a cross bill was filed by the company, praying a sale of the lots to reimburse for money paid under the terms of the trust, etc., and the court held that, both parties being in pari delicto, neither was entitled to relief.

To summarize the conclusions to which we are led in this case, we hold:

That the condition not to build a side track at the town of El Moro is void as against public policy.

That the contract is one of mutual promises which constitute mutual considerations.

That the void condition mentioned was part of the consideration for the covenant sued on.

That as such consideration, it is not severable from the entire contract, and hence no recovery can be had, the obligation resting in part upon such illegal consideration.

In further support of our construction of this contract, and the legal conclusions thereupon, we cite the following cases: Kimbrough *v.* Lane, 11 Bush. 556; Wider *v.* Webb, 20 O. St. 431; Saratoga County Banks *v.* King, 44 N. Y. 87; Chandler *v.* Johnson, 39 Geo. 85; Braitch *v.* Guelick, 37 Iowa, 212; More *v.* Bonnett, 40 Cala. 251; Bixby *v.* Moor, 51 N. H. 402; Valentine *v.*

Stewart, 15 Cala. 404; Hamilton *v.* Thrall, 7 Neb. 210; Arnott *v.* The P. & E. Coal Co., 2 Hun, 591; Hanaur & Co. *v.* Gray, 25 Ark. 351.

The demurrer was properly sustained, and the judgment of the court below is affirmed.

BROWN

v.

THE MANCHESTER, SHEFFIELD AND LINCOLNSHIRE RY. CO.

(*L. R.*, 9 *Q. B. Div.* 230. *April* 4, 1882.)

The plaintiff, a fish merchant, signed a contract by which, in consideration of the defendants, a railway company, carrying his fish at a rate one fifth less than the ordinary rate, he agreed to free the defendants from "all liability for loss or damage by delay in transit or from whatever cause arising." Owing to pressure of business the fish of the plaintiff and others was some hours late in starting, and reached London too late for the market.

Held, that, as the defendants carried at alternative rates, the condition was just and reasonable, although it was absolute and contained no exception, and would in the absence of alternative rates have been unjust and unreasonable.

APPEAL on special case stated by the county court judge at Great Grimsby, the material facts of which were as follows:

The plaintiff was a fish merchant carrying on business at Great Grimsby, and had for some years been in the habit of delivering to the defendants consignments of live codfish to be carried to London for the Billingsgate Market. The practice was to stun the fish before they were fetched away by the company's servants; and that they should in the ordinary course be despatched from Great Grimsby by the mail train at 8.13 P.M., or by the fish train at 8.40 P.M., so as to reach Billingsgate before the opening of the market at 5 A.M.

On the 28th of December, 1880, the plaintiff signed the following "risk note":

"Manchester, Sheffield, and Lincolnshire Ry.

"Risk Note.

"Grimsby Docks Stations, 28th Dec., 1880.

"Mr. Henry Brown.

"'Fish Traffic.'

"Sir—I beg to inform you that to parties willing to free and relieve this company and the other railway companies over whose lines fish may be forwarded from any of our stations from all liability for loss or damage by delay in transit or from whatever other cause arising, the company agree that the rates charged will be one

fifth lower than where no such undertaking as the annexed is granted.

"I am, sir,
"For and on behalf of the company,
"Your obedient servant,
"JAMES REED."

"28th Dec., 1880.

"Sir—In reference to the above, I request that you will forward all fish delivered by me or on my account from any of your stations at the lower rate, and I undertake and agree to free and relieve the railway companies from all claims or liability for loss or damage.

"This undertaking to remain in force from the present date until the 31st of December, 1885.

"I am, sir,
"Your obedient servant,
"HENRY WILLIAM BROWN.

"Mr. Reed,
"Grimsby Docks Station,
"M. S. & L. Ry. Co.
"Witness, W. H. WATKINSON."

The whole of the risk note, excepting the signatures, date, and address, is a lithograph form supplied by the defendants.

On the 13th of April, 1881, two days before Good Friday, the quantity of fish delivered by the merchants at Great Grimsby to the defendants for carriage was very large, and in excess of any previous year at the same season; but the defendants did not refuse to accept any consignments or make any special provision, except by engaging additional men to load the fish, for sending off the live fish for Billingsgate, so that it should arrive in time for the market; nor did they give any warning of the state of matters to the plaintiff. The plaintiff therefore stunned his fish, and packed them ready to be hauled away by the defendants and despatched to London.

The plaintiff's fish were despatched by a special fish train at 3.25 A.M. on the 14th of April instead of by the 8.40 P.M. on the 13th; they were therefore too late for the Billingsgate Market; and it was agreed that the plaintiff thereby suffered a loss of £1.

The plaintiff's fish might have been despatched at the ordinary time had all the vans for London been drawn from out of the general mass of trucks and vans laden with fish standing ready for despatch to all parts of the country; but to have taken this course would have still further delayed the despatch of all the other fish trains, and would have caused additional expense to the defendants.

The county court judge held that the defendants had failed to

justify the delay, and that they were not protected by the risk note, but he stated a special case.

It was admitted during the argument that there was a published legal rate, having no conditions attached to it, which left the company liable as common carriers.

Gully, Q. C. (C. A. Russell, with him), for the defendants. There was a reasonable alternative put before the plaintiff, and the consignment note was the contract which those desirous of having the benefit of the reduction of one fifth signed. Where there are alternative rates, the condition exempting the carrier from liability when carrying at the lower rate is just and reasonable; Lewis *v.* Great Western Ry. Co., 3 Q. B. D. 195; although where no option whatever is given to the sender such a condition is held to be unreasonable: Rooth *v.* North Eastern Ry. Co., Law Rep. 2 Ex. 173.

[He also cited Peek *v.* North Staffordshire Ry. Co., 10 H. L. C. 473; Ashenden *v.* London, Brighton, and South Coast Ry. Co., 5 Ex. D. 190; Simons *v.* Great Western Ry. Co., 18 C. B. 805.

Cyril Dodd (Webster, Q. C., with him), for the plaintiff. The fact of there being an alternative rate does not make a condition just and reasonable which in itself is unjust and unreasonable; here the condition is unlimited, there being no exception even for wilful misconduct; such a condition has never yet been held reasonable. The defendants relied on Glenister *v.* Great Western Ry. Co., 29 L. T. (N. S.) 423, at the trial; but the condition in that case expressly excepted wilful misconduct. No reasonable alternative has been offered to the plaintiff, but only an option between the parliamentary rate, which any one can have, and the rate relieving the defendants of all liability; this is no real option; there must be an option of something better than the parliamentary rate.

Secondly, not starting is not a "delay in transit," and is therefore not covered by the condition.

[He also cited McManus *v.* Lancashire and Yorkshire Ry. Co., 4 H. & N. 327; Allday *v.* Great Western Ry. Co., 5 B. & S. 903.

MATHEW, J.—The only point which it is necessary for us to consider is, whether the liability of the defendants has been extinguished by the terms of the special contract. If that contract stood alone, probably there would be no doubt that it would be unreasonable. It is in form a letter sent to the customer, and assented to by him. [The learned judge here read the contract.] The difficulty suggested itself to us that the facts given in evidence and those contained in the case did not disclose what were the other rates referred to in the document. Thereupon counsel very properly agreed to the effect that there were certain public legal rates available to the customers of the defendants, and that customers who sent goods at those rates had no conditions imposed upon them in restriction of the defendants' liability, the defendants remaining

liable as common carriers. The customer could, in fact, have demanded that the defendants should carry as common carriers, and be liable to all the risks attached to such carriage. But the defendants proposed to the plaintiff the terms which I have read, and, in consideration of his accepting those terms, agreed to carry his goods at one fifth less than the rate which they would otherwise have charged; and to these terms the plaintiff agreed. The meaning of the agreement seems to me perfectly clear, although Mr. Dodd used considerable ingenuity in endeavoring to show that it meant something entirely different. The question for us is whether that agreement is reasonable or not; and there are many facts in the case which are elements for us to consider in determining that question, and which are evidence of the reasonableness of the agreement. In the first place, it is clearly made out that the plaintiff, the customer, had an alternative; he was not compelled to send at a certain rate. Secondly, he, being a fish merchant, entered into an agreement affecting his business, and it is found that all dealers in fish are in the habit of entering into similar agreements. Further, the plaintiff admitted that he had made a considerable saving by sending his fish at this rate, and that he knew what were the ordinary rates and the advantages of the lesser rate. It is, therefore, a question of fact whether the condition is reasonable or not, and in my judgment it is reasonable. I wish to add that although the damage in the present case arose from delay in starting the train from the forwarding station, I am clearly of opinion that such damage comes within the meaning of "damage caused by delay in transit."

CAVE, J.—I am of the same opinion. The only question is whether the condition is just and reasonable. There is some difficulty in understanding what "just" means, and I construe it in a sense favorable to the sender by making it depend on the question whether the contract was to his advantage. I think it clear that the Railway and Canal Traffic Act contemplates that there may be a condition exempting the carrier from all liability, which nevertheless may be just and reasonable; and the justice and reasonableness of the condition depend on what the sender gets in exchange for the company's liability as common carriers which he gives up. If there were only one rate, and the condition were that the company would not be answerable at all, such a condition would be unjust. But that is not the present case. Here the sender has the alternative and option offered him of sending his goods at the ordinary rate and on the ordinary terms as to liability, or of sending them at a reduction of one fifth, which is offered him on condition of his freeing the company from all liability. Is it expedient for him to accept this offer? If it is, we cannot say that it is unjust or unreasonable. We are not, indeed, to consider whether it is ex-

pedient for the company; the legislature contemplates that a railway company can take care of itself. But is it expedient for the sender? On this point we have as strong evidence as can be asked for. The plaintiff, a man of business, with a pecuniary interest in getting his fish to market to his own greatest advantage, thought it to his advantage to accept the company's offer, and to take a reduction in the rate of carriage rather than keep to the ordinary rate and liability. In my opinion the condition was just and reasonable.

Dodd asked for leave to appeal, which was granted.

Judgment for the defendants, with costs.

Cox

v.

The Great Western Ry. Co.

(*L. R.* 9 *Q. B. Div.* 106. *April* 3, 1882.)

H., who was in the employ of a railway company as a "capstan-man," without giving the usual warning, propelled a series of trucks along a line of rails in a goods station, and injured the plaintiff, who was engaged in similar work at the other end of the line about 100 yards off. The capstan was set in motion by hydraulic power communicated to it by H. from a stationary engine at a distance:

***Held*, that there was evidence to warrant the jury in finding that H. was a person who had the charge or control of "a train upon a railway" under s. 1, sub-s. 5, of the Employers' Liability Act, 1880 (43 and 44 Vict. c. 42).**

Action under the Employers' Liability Act, 1880 (43 and 44 Vict. c. 42), for personal injury sustained by the plaintiff whilst in the defendants' employ. The particulars of claim alleged that the injury was caused by the negligence of one Hopker, a capstan-driver in the defendants' service, "the said Hopker being a person who at the time had the control of a train upon a railway within the meaning of sub-s. 5 of s. 1 of the Employers' Liability Act, 1880, and who negligently exercised such control."

The cause was tried before the deputy judge of the Marylebone county court on the 17th of March, 1882. The facts were in substance as follows:—The plaintiff, a youth of seventeen, was on the 30th of August, 1881, in the employ of the railway company at their goods station at Poplar as a capstan boy or scotcher, his duty being to scotch the trucks and to hang the rope on when they were being moved by the capstan. At the spot where the accident happened there were six lines of rail about 100 yards long; at each end of each line was a turn-table for the purpose of shifting the trucks to move them up successively to a platform to be unloaded or loaded; and this process was performed by means

of two capstans at each end of the six lines of rail, which were worked, by a man and a boy, the motive power being supplied by a fixed hydraulic engine, and communicated to the capstan by the man in charge of it placing his foot upon a treadle. Whilst the plaintiff was engaged, with the aid of the man under whom he was working, in moving a truck on the turn-table on one of the lines in order to attach it to a series of twelve trucks on the adjoining line, Hopker, who had charge of the capstan at the other end, inadvertently backed the twelve trucks and caught the plaintiff between the buffer of the last of the twelve and the buffer of the truck which the plaintiff was turning, and severely injured him. It was proved that the plaintiff was properly between the trucks for the purpose of removing an obstruction, it being what is called "lock-buffered:" and there was conflicting evidence as to whether or not Hopker had given the usual warning prior to putting his capstan in motion. One of the plaintiff's witnesses said that "the capstan-man moves any trucks he is ordered to move; he has no charge of any particular train."

On the part of the defendants it was submitted that there was no evidence to go to the jury of negligence on the part of Hopker; and, further, that Hopker was not a person who had the charge or control of a train upon a railway, for whose negligence the company could be made responsible within s. 1, sub-s. 5, of the Act.

The deputy judge declined to nonsuit, and, at the request and with the assent of the counsel on both sides,—the amount of damages being agreed,—he left two questions to the jury, viz.:

1. If and so far as it may be a question for you, was Hopker a person who had the charge or control of a train upon a railway?

2. Was Hopker negligent?

The jury having answered both questions in the affirmative, the deputy judge ruled as matter of law that the injury complained of was not caused "by reason of the negligence of a person in the service of the defendants who had the charge or control of any signal, points, locomotive engine, or train upon a railway," within the meaning of s. 1, sub-s. 5, of the Act; and he therefore gave judgment for the defendants.

Lyon obtained a rule nisi to enter judgment for the plaintiff for the damages agreed upon.

R. S. Wright showed cause. It would be manifestly a straining of language to call a mere laborer who is not called upon to exercise either intelligence or discretion, "a person who has the charge or control of a train upon a railway."

[Mathew, J. If this man had not the control of the train, who had? Suppose the capstan had been moved by means of a hand-spike, or with the aid of a horse, would not Hopker have been the person in charge of the train?]

Trucks placed in the goods station for the mere purpose of being unloaded can hardly be called "a train upon a railway."

Lyon, in support of the rule. There is no definition of a "train" in the Act; but the dictionaries which are usually referred to define a train to be a series of carriages or other vehicles coupled together or placed one after another, as these trucks were; as, for instance, a train of artillery. And it can hardly be contended that a siding or goods station does not form part of the line of railway. If, instead of being a capstan driver, Hopker had been an ordinary engine-driver, there could have been no doubt. Hopker was the only person who could have set the trucks in motion; and he admitted that it was his duty to give warning to those who might be on or about the line before he did so.

MATHEW, J.—I think this rule should be made absolute. At the trial the judge put two questions to the jury. One was whether Hopker was guilty of negligence. The jury found that he was. The other question was this, whether (so far as it might be a question for the jury) Hopker was a person who had the charge or control of a train upon a railway. This also the jury answered in the affirmative. A doubt was suggested as to whether the line of trucks here was "a train;" and that question has been raised upon the argument before us. If that was, as I think it was, a question of fact, was there any evidence that Hopker was a person having the charge or control of the train? He was the person who was working the capstan and who alone could put the train of trucks in motion. The language of the Act is that the plaintiff can only recover against his employers where he has sustained an injury "by reason of the negligence of a person in the service of the defendants who had the charge of any signal, points, locomotive engine, or train upon a railway." Did the twelve trucks constitute a train? It seems to me that they did. A train is a train, whether consisting of trucks laden with goods or of carriages filled with passengers. The character of the load makes no difference. Nor do I think that a locomotive engine is essential to the making of a train. The place where the accident occurred was clearly a part of the line of railway. I am of opinion that there should be judgment for the plaintiff for the amount of damages agreed upon.

CAVE, J.—I am of the same opinion. There is some little nicety whether a number of trucks in a goods station (as here) can properly be said to constitute a train. The trucks, twelve in number, were coupled together in the usual way. There was no locomotive engine attached to them; but the motive power was communicated to them through a capstan which was worked by a stationary hydraulic engine. If this had been a train on the line

of railway with a locomotive, and Hopker had been the driver of the engine he clearly would have been a person having the charge or control of the train within the meaning of the Act. Does it make any difference that there was no locomotive engine, but a stationary hydraulic engine and a capstan under his control, and that the place was a goods station into which the line of rails extends for the purpose of effecting the delivery of the contents of the trucks? Looking at the danger of putting these things in motion without proper warning, it seems to me to be immaterial whether the motive power was fixed or movable, or upon which portion of the line the accident happened. As the legislature have used words which are capable of being applied to such a case as this, I think we are justified in coming to the conclusion that the county court judge was wrong, and that Hopker was, as the jury have found he was, a person having the charge or control of a train upon a railway within the Act. There will, therefore, be judgment for the plaintiff for £70, the agreed damages, with costs.

Judgment for the plaintiff.

Leave to appeal refused.

PULLING

v.

THE GREAT EASTERN RY. CO.

(*L. R.* 9 *Q. B. Div.* 110. *June* 7, 1882.)

The plaintiff sued as the administratrix of her late husband, who, whilst crossing the defendants' railway at a level crossing was, through the negligence of the defendants, run over by an engine and sustained personal injuries which prevented him from following his occupation and earning wages, and caused him to incur expenses for medical attendance and nursing, whereby his personal estate was diminished in value:

***Held*, that the plaintiff could not sue in respect of damage to the intestate's estate arising, as above mentioned, from the tortious injury to the intestate's person, and that the action was therefor not maintainable.**

STATEMENT of claim was in substance as follows:

The plaintiff was the administratrix of Edward Pulling, deceased, her husband, and he had commenced the action in his lifetime. By an order of the Court the plaintiff had been substituted as plaintiff in the action in place of the said Edward Pulling, deceased. The plaintiff alleged that the said Edward Pulling while crossing the defendants' railway by a level crossing on a highway was, by and through the negligence of the defendants in and about the working of the defendants' railway and the management of an engine of the defendants, knocked down and run over

by the engine, and sustained personal injuries. It was further alleged that in consequence of the aforesaid injuries the deceased was forced to leave his employment, and was prevented from the time when he was so injured until his death from following his occupation, and from deriving therefrom the wages and profits which he otherwise might and would have earned and acquired, and he also incurred expenses in obtaining medical attendance and nursing and otherwise during his illness, and at the time of his death his personal estate and effects were much diminished in value by reason of the circumstances aforesaid.

Demurrer.

Lush Wilson, for the defendants, in support of the demurrer, was stopped by the court.

Clay, for the plaintiff, in support of the statement of claim, contended that, inasmuch as damage had been occasioned to the estate of the intestate, he having incurred medical expenses and sustained pecuniary loss in his lifetime through his injuries, the action was maintainable by his administratrix under 4 Edw. 3, c. 7. [He cited Bradshaw *v.* Lancashire and Yorkshire Ry. Co., Law Rep. 10 C. P. 189; Leggott *v.* Great Northern Ry. Co., 1 Q. B. D. 599; Twycross *v.* Grant, 4 C. P. D. 40; Potter *v.* Metropolitan District Ry. Co., 30 L. T. (N. S.) 765; Chamberlain *v.* Williamson, 2 M. & S. 408; Lockier *v.* Paterson, 1 C. & K. 271; Williams, Saunders' Edition, 1871, p. 244.]

Denman, J.—I think that our judgment must be in favor of the demurrer. This action is clearly an action of tort, the cause of action alleged being the negligent management by the defendants of their railway and engine, whereby the original plaintiff sustained personal injury. The present plaintiff, his administratrix, alleges that the effect of the tort was to cause him to incur medical expenses before his death, and in respect of those expenses it is contended that the action is maintainable. I do not think that we can hold this action maintainable without in practice entirely abrogating the doctrine of law expressed in the maxim "actio personalis moritur cum personâ." To a certain extent that doctrine has been qualified. Under the Statute of Edward III. it has in many cases been held that, where the cause of action, whatever its form may be, is in respect of a tortious impairment of the personal estate, such action may be maintained by the personal representative. But none of the authorities go so far as to say that, where the cause of action is in substance an injury to the person, the personal representative can maintain an action merely because the person so injured incurred in his lifetime some expenditure of money in consequence of the personal injury. The case of Bradshaw *v.* Lancashire and Yorkshire Ry. Co., Law Rep. 10 C. P. 189, certainly does not go to that length, because the judgments in that case are expressly based upon the distinction in this respect be-

tween actions of contract and actions of tort, and upon the fact that in that case the action was an action of contract. The case of Leggott *v.* Great Northern Ry. Co., 1 Q. B. D. 599, was decided upon the same principle as Bradshaw *v.* Lancashire and Yorkshire Ry. Co., 1 Law Rep., 10. C. P. 189, though Quain, J., expressly dissented from the decision in that case so far as his personal judgment was concerned, and Mellor, J., did not express any approval of it, but considered himself bound by it as an authority. There was not anything said in the judgments in Leggott *v.* Great Northern Ry. Co., 1 Q. B. D. 599, to warrant our going to the length to which we should be going if in the present case we held that the maxim "actio personalis moritur cum personâ" did not apply. The duty, for breach of which the action was brought in that case, arose out of a contract, and the action was in substance for breach of contract to use due care towards the passenger whilst waiting for his train on the platform. Some of the expressions used by the judges in the case of Twycross *v.* Grant, 4 C. P. D. 40, seem no doubt to go to considerable lengths, but those expressions must be construed with reference to the cause of action in that case. The cause of action there was not an injury to the person, but in respect of the pecuniary damage done to the intestate's estate by reason of the failure to perform the statutory obligation to disclose certain contracts. The present is an altogether different case. Here the tort complained of is an injury to the person arising from the defendants' negligence. There is no decision which supports the proposition that, because in consequence of such injury the person injured is put to expense, the case is brought within the category of cases to which the statute of Edward III. applies. Medical expenses are almost always made an element of damage in actions for injury to the person, but it has never before been suggested that the personal representative could maintain an action on the strength of such expenses. For these reasons I think our judgment must be for the defendants.

Pollock, B., concurred.

Judgment for the defendants.

HETHERINGTON

v.

THE NORTH EASTERN RY. CO.

(*L. R.*, 9 *Q. B. Div.* 160. *June* 30, 1882.)

In an action brought, under 9 & 10 Vict. c. 93, for the benefit of the father of the deceased, evidence was given that the father, who was fifty-nine years of age, was nearly blind and injured in his leg and hands, and was not so able

to work as he had been, but worked when he could; that the son used to contribute to his support; that five or six years previously, the father being out of work for six months, the son had assisted him pecuniarily out of his earnings, but had not done so since:

***Held*, that there was evidence for the jury of pecuniary injury to the father from the son's death.**

ACTION under 9 & 10 Vict. c. 93 (Lord Campbell's Act), for causing the death of a person through negligence, brought by the plaintiff, as personal representative of the deceased, against the company for the benefit of the plaintiff, the father of the deceased.

The action was brought in the county court of Northumberland under the provisions of the Employers' Liability Act, 1880, the deceased being a servant of the company. At the trial, which took place before a jury, the plaintiff gave evidence as follows:— "The deceased was my son. He was twenty-nine years old. He gave me a portion of his earnings when I wanted it. I am nearly blind and injured in my leg and hands. My son used to contribute to my support. I work when I can. I am not so able to work as I used to be. I am fifty-nine. My son was not married." Cross-examined: "Five or six years ago I was out of work for six months, and my son was very kind to me and helped me." Re-examined: "He was always kind to me. I have never had money from him since." Upon this evidence the county court judge ruled that there was no sufficient evidence of pecuniary injury occasioned to the father by his son's death to sustain the action, and nonsuited the plaintiff. A rule nisi had been obtained for a new trial on the ground of misdirection, against which

Gainsford Bruce showed cause. It is clear that there must be evidence of pecuniary injury to support the action. A reasonable probability must be shown of advantage to the relation for whose benefit the action is brought from the life of the deceased: Franklin *v.* South Eastern Ry. Co., 3 H. & N. 211; Pym *v.* Great Northern Ry. Co., 4 B. & S. 396; Sykes *v.* North Eastern Ry. Co., 44 L. J. (C. P.) 191. There was no reasonable evidence of pecuniary loss occasioned to the father by the son's death to go to the jury. It was admitted by the father that his son was not contributing to his support at the time of his death, and had not in fact assisted him for five or six years. The mere relation of parent and child cannot give rise to the presumpton that the child will give pecuniary assistance to his father, and from the fact that five years before the son assisted the parent pecuniarily no reasonable inference arises with regard to the probability of his doing so again. The Act contemplates some more substantial evidence of an actual pecuniary interest than the mere probability that a son may assist his father pecuniarily.

Steavenson, in support of the rule, was not called upon.

FIELD, J.—In this case the action is brought for the benefit of the parent, one of the relations for whose benefit the statute allows the action to be brought. I have always understood the rule laid down by the decisions in such cases to be that there must have been a reasonable expectation of pecuniary advantage to the relation from the life of the deceased. The defendants' counsel alleges that there is no evidence of any such reasonable expectation in this case. I cannot come to that conclusion. It is not for me to say what as a juryman I should find on such evidence. The arguments that the defendants' counsel used would be very proper arguments to be urged upon the jury. I cannot, however, help thinking there was some evidence for the jury, and therefore this rule must be made absolute.

CAVE, J.—I am of the same opinion. I think there was some evidence for the consideration of the jury, and that it was for them to say whether on that evidence there was a reasonable expectation of pecuniary advantage to the father from his son's life, and what, if so, the measure of such expectation was.

Rule absolute.

THE YORK TRAMWAYS CO., LIMITED,

v.

WILLOWS.

(*L. R.*, 8 *Q. B. Div.* 685.)

The plaintiff company was constituted by seven persons signing the memorandum of association. Afterwards they all were summoned to attend a meeting, but only four attended, and they elected three directors. These three elected three other directors. The three original directors resigned, and afterwards one of the remaining directors sent in his resignation. The defendant then applied for fifty shares. The two remaining directors resolved that fifty shares should be allotted to the defendant, that he should be appointed a director, and that the resignation of the retiring director should be accepted. The defendant afterwards attended a meeting of the directors, confirmed the allotment to himself, and joined in passing a resolution, that the shares allotted to himself should be paid up in full forthwith. The defendant subsequently withdrew his application and refused to pay the amount of the shares allotted to him. By the articles of association the number of the directors was to be not less than three, and any casual vacancy occurring in the board might be filled up by the board, and the continuing board might act notwithstanding any vacancy in their body:

***Held*, that the defendant was liable to pay the amount of the shares.**

ACTION to recover from the defendant £500, being the amount due from the defendant to the plaintiffs in respect of fifty shares.

The facts of the case may be here briefly stated as follows:

The company was registered on the 19th of December, 1878, and was constituted by seven persons subscribing the memorandum

of association. At a meeting of these subscribers, held on the 22d of June, 1879, of which all had notice, but only four attended, it was resolved that Gane, Jones, and Stephenson should be elected the first directors of the company, of whom two were to form a quorum. At a meeting of the directors held on the 25th of May, 1880, Jones and Stephenson being present, it was resolved that Fry, Heseltine, and Everitt should be directors of the company. At a meeting of the directors held on the 2d of June, 1880, Fry and Everitt being present, a letter dated the 26th of May, 1880, was read from Stephenson, Jones, and Gane, intimating their desire to retire from their position as directors of the company, and their resignation was thereupon accepted. At a meeting of the directors, held on the 15th of September, 1880, Heseltine and Everitt being present, a letter was read from Fry, dated the 16th of August, resigning his seat on the board, and it was then resolved that he should be requested for the time being to defer his resignation. On the 26th of October, 1880, the defendant signed an application for fifty shares in the following terms:

"October 26, 1880.

"To the Directors of

"The York Tramways Co., Limited.

"Gentlemen,

"I request you to allot to me fifty shares in the York Tramways Co., Limited, and agree to accept such shares when allotted to me."

At a meeting of the directors, held on the 28th of October 1880, Heseltine and Everitt being present, it was resolved that the fifty shares applied for should be allotted to the defendant, that Fry's resignation of his seat on the board should be accepted, and that the casual vacancy thereby caused should be filled up by the election of the defendant as a director of the company. At a meeting of directors, held on the 15th of November, Everitt, Heseltine, and the defendant being present, the minutes of the previous meeting held on the 28th of October were read and confirmed, and it was resolved that shares should be allotted to various persons, and that the shares so allotted, together with the fifty shares allotted to the defendant at the meeting on the 28th of October, should be paid up in full forthwith, and that the York City and County Bank should be authorized to receive the sums to be paid in respect of these shares; and the three directors then present signed a letter to the bank-manager, with instructions to honor checks drawn upon the account of the York Tramways Co. when signed by any one of them and countersigned by the secretary.

On the 19th of November, 1880, the defendant tendered his

resignation as director of the company and withdrew his application for shares.

The articles of association, so far as they are material, were as follows:

Art. 2. "The Board" shall mean the directors for the time being or, as the case may be, a quorum of such directors assembled, at a meeting thereof, constituting a board for the transaction of business.

Art. 62. The business of the company shall be managed by the board. . . .

Art. 66. The office of any one of the board shall (subject as hereinafter mentioned) be vacated, if he delivers to the board or to the secretary a notice in writing of his resignation of his office of director provided that there shall be a resolution of the board to the effect that such vacation of office shall take place, in passing or not passing which resolution the board shall have full discretion.

Art. 68. The number of the board shall not be less than three nor more than seven.

Art. 69. No person, except the first directors, and such persons as may be appointed by them under the next clause, shall be qualified to be a director, who is not the registered holder of shares in the company of the nominal value of £100, and who has not been the holder of such shares for at least three months.

Art. 70. The first directors shall be determined by the subscribers to the memorandum of association. Until directors are appointed, the subscribers to the memorandum of association of the company shall be the directors of the company. The first directors shall have power to add to their number any other person or persons at any time before the third ordinary general meeting, but so that the total number of the board shall not at any time exceed seven. The first board and those who may be added to their number as in the present clause provided shall continue in office, unless they die or resign or become disqualified, until the third ordinary general meeting. . . .

Art. 72. Any casual vacancy occurring in the board may be filled up by the board. The continuing board may act, notwithstanding any vacancy in their body.

Art. 74. The board may meet together for the despatch of business, adjourn, and otherwise regulate their meetings as they think fit, and determine the quorum necessary for the transaction of business. . . .

Art. 76. The board shall cause minutes to be made in books provided for the purpose, of the following matters, namely: of all appointments of officers, servants, and sub-committees made by the board; of the names of the persons present at every meeting of the board, and of all orders, resolutions, and proceedings of all

general meetings and of the board. All acts done by a meeting of the board, or by any person acting as one of the board, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any of the board, or of such person acting as aforesaid, or that they or any of them were or was disqualified, or had in any way vacated their or his office, be as valid as if every such person had been duly appointed and was duly qualified.

The action was tried without a jury before Manisty, J., who delivered the following judgment:

MANISTY, J.—It is all-important in this case to bear in mind, and to get into consecutive order, the proceedings of this company, which from the beginning to the end seem to have been conducted in a most irregular manner. I may observe on starting, that the defendant appears to have no merits in his favor, his objections are purely technical, and it is no doubt an attempt to get out of a liability into which he entered with a perfect knowledge of what he was doing.

The articles of association of the plaintiff company must govern my decision, and I shall have to refer to them frequently in the course of my judgment. There were seven subscribers to the memorandum of association, and by the articles of association the first directors were to be appointed by those subscribers. Notice of a meeting was given to all the subscribers, but at the meeting, which was held upon the 22d of June, 1879, only four were present, and those four appointed three directors, Jones, Gane, and Stephenson, and these were three of their own body. I do not intend to express any opinion upon the validity of that appointment. The inclination of my opinion is that it was a good appointment, and I will assume it to be good for the purposes of this case. In my opinion these three, Jones, Gane, and Stephenson, were the "first directors" within the meaning of the sixty-ninth and seventieth articles, and having power to add to their number by virtue of the seventieth article, on the 25th of May, 1880, they did add to their number. Whether this was a valid election, I do not decide; but for the purposes of this case I will assume it to have been a valid election. There were only two directors present, Jones and Stephenson, and they elected three new directors, Fry, Heseltine, and Everitt. If the meeting at which they were elected was properly convened and constituted, Fry, Heseltine, and Everitt were appointed by the first directors, and did not need any qualification. Therefore, on the 25th of May, 1880, a board of six members was constituted. It is evident, however, that the intention was that the board should not continue to be constituted of six members, because on the following day, the 26th of May, all the three who had been elected by the subscribers to the memoran-

dum of association, namely, Gane, Jones, and Stephenson, resigned. On the 26th of May the board was reduced to the number of three directors, and it appears to have continued down to the month of August. By the sixty-second of the articles of association, the business of the company is to be managed by the board, and by the sixty-eighth article the number of the board is to be not less than three nor more than seven. Power is given to the board to determine the quorum necessary, but I must take it, for the purposes of this case, that no resolution was ever passed determining the number of the quorum. It may have been determined at a meeting of the subscribers to the memorandum of association that there should be a quorum, but that is immaterial; for it was necessary that the board should determine the quorum. The company continued to transact business with apparently only two directors, although there were in truth three directors, Fry, Heseltine, and Everitt. Of these, Fry resigned on the 16th of August, but his resignation was not accepted until the 28th of October. The other two directors had a meeting on the 15th of September, and on the 5th of October, after the resignation of Fry, appear to have transacted most important business of the company by making a contract of upwards of £8000 for the construction of works, and by allotting 810 shares. This seems to me a most unsatisfactory mode of conducting the business, and whilst matters stood in this condition the important events for this action occurred. In October the defendant applied for fifty shares, and on the 28th only two directors, Heseltine and Everitt, being present, they accepted Fry's resignation, and allotted fifty shares to the defendant, and they elected him a director. This brings me to the meaning of the seventy-second of the articles of association, and I think that the proper construction of that article is, that any casual vacancy occurring in the board may be filled up by the board, and the continuing board may act in this respect, that is, for filling up the vacancy, notwithstanding any vacancy happening in their body. This seems to me a sensible and a proper construction; if a different construction were adopted, a board of two might transact all the business of the company, notwithstanding the sixty-eighth article, which provides that the board shall be of not less than three members, and the important provisions with respect to the management of the business of the company would be rendered null and void. If that be the right construction, there was a vacancy in the number of the board, and I will assume that it was a "casual vacancy" within the meaning of the articles, and that the remaining members of the board might fill up that vacancy; that would not, in my opinion, entitle the two directors to transact the business of the company by disposing of shares and by making contracts; the two directors must fill up the vacancy, and then the board of directors would again be not less than three, and might

carry on the business and transact the affairs of the company. If this is correct, what was the position of the defendant as regards qualification on the 28th of October? He was elected, but he was not qualified, because he was not, I think, either one of the first directors, or one of those appointed by the first, and therefore he could not be elected unless he was qualified. If I am right in the construction of the seventy-second article, the two directors, Heseltine and Everitt, could not allot the shares on the 28th of October.

But it has been contended for the plaintiffs that even if that is so, a meeting was held on the 15th of November, and that three directors were then present, Everitt, Heseltine, and the defendant. Whether three directors were present at the meeting depends upon this, whether or not the defendant was a director. If he was a director, I should be inclined to hold, both upon the authorities and upon principle, that the confirmation of the allotment made on the 28th of October was the same as an original allotment. Then, was the defendant a director? It has been contended that by virtue of the Companies Act, 1862, s. 67, the fact that he was not qualified as a director is immaterial, and that the acts done by him are valid, and I have entertained some doubt whether it lies in his mouth to say that he was not qualified as a director, and that the allotment on the 28th of October which was confirmed on the 15th of November was void. If it was void altogether, of course ratification would not make it good. But if what took place on the 15th of November is to be treated as an original allotment, then the question of ratification and confirmation is of course out of the question; and it seems to me that the allotment in October must be struck out and treated as a nullity, and then the only question is, what is the effect of the acts done on the 15th of November? The directors present confirmed the allotment made on the 28th of October. In my opinion that was tantamount to an original allotment, and they then resolved that shares should be allotted to various persons, and that the shares so allotted, together with the fifty shares allotted to the defendant at the last meeting, should be paid up in full forthwith, and that the York City and County Bank should be authorized to receive the sums to be paid in respect of those shares; and the three directors then present signed a letter to the bank manager with instructions to honor checks drawn upon the account of the York Tramways Company, when signed by any one of them and countersigned by the secretary. There is no doubt that the defendant did act as a director by becoming a party to the resolution and by signing the letter to the bank. Whatever objections may be taken by other persons to his appointment, I have come to the conclusion that under those circumstances he is liable, and that he cannot be heard to say that the allotment was not made: he sent an application in writing, he accepted the allotment, and he became a party to the

resolution by which he was to pay up the shares in full. I therefore give judgment for the plaintiffs.

The defendant appealed.

March 20, 21. Murphy, Q.C., and Edwyn Jones, for the defendant. Two questions arise in this case: first, was the allotment to the defendant valid? and secondly, is he estopped from denying his liability on the shares by having acted as a director?

As to the first point, Article 62 provides that the business of the company shall be managed by the board, and Article 68 provides that the board shall consist of not less than three members; but on the 28th of October, when the shares were allotted to the defendant, only two directors were present and acted, and this is sufficient to avoid the allotment. In re Alma Spinning Co., Bottomley's Case, 16 Ch. D. 681.

[Brett, L. J., referred to Re Phosphate of Lime Co., Austin's Case, 24 L. T. (N. S.) 932.]

It is submitted that the decision in that case was erroneous, and ought not to be followed in the Court of Appeal. The authorities cited in 1 Lindley on Partnership, bk. ii. ch. i. s. 2, p. 244 (4th ed.), show that the acts of directors, when they are less than the minimum number, are invalid. There was no lawful quorum, and the two remaining directors could not act. The defendant was not qualified to sit as a director, for he was not one of the first directors, and he had not held his shares for three months at the time of his appointment. Moreover, the appointment of the original directors was invalid, because the full number of subscribers to the memorandum of association was not present. Howbeach Coal Co. v. Teague, 5 H. & N. 151; 29 L. J. (Ex.) 137.

As to the second point, it is plain that the defendant is not estopped from denying his liability by having acted as director. Howbeach Coal Co. v. Teague, 5 H. & N. 151; 29 L. J. (Ex.) 137 is an authority also as to this point.

Willis, Q.C., and Horne Payne, for the plaintiffs. The appointment of the defendant as a director cannot now be questioned, there having been no fraud in his election: Murray v. Bush, Law Rep., 6 H. L. 37. A mere change in the constitution of a board of directors will not render an allotment invalid: Hallows v. Fernie, Law Rep. 3 Ch. 467. As to the question of estoppel, the defendant, having acted as a director, cannot now be heard to say that he is not liable in respect of the number of shares for which he had applied.

Murphy, Q.C., in reply. The specified number of directors must be rigidly adhered to: 1 Lindley on Partnership, bk. 3, ch. 1, s. 2, p. 542 (4th ed.). In the present case the plaintiffs are suing in their own name and must be treated as a going concern, and this circumstance distinguishes the present case from In Re Great Oceanic Telegraph Co., Harward's Case, Law Rep. 13 Eq. 30, and

In re British and American Telegraph Co., Fowler's Case, Law Rep., 14 Eq. 316; for in those cases the companies had been ordered to be wound up, and the question to be determined was who were liable to the creditors of the insolvent companies. At the meeting of the 15th of November only two directors existed, and the defendant could not confirm an allotment to himself.

Lord Coleridge, C.J.—A great many points have been argued in this case; but, on the whole, I am of opinion that the judgment of Manisty, J., was right and ought to be affirmed.

The plaintiffs bring this action against the defendant for a call, and the defendant alleges by way of defence that no allotment of shares has been made to him. In order to ascertain whether an allotment has been made, we must examine the facts and the constitution of the company; it will render matters clearer to take the facts first.

Some time before the alleged allotment of shares to the defendant the company was constituted by signing the memorandum of association; at a meeting of the subscribers to which all were summoned, but which only four attended, three directors were appointed, and they appointed three others. This brought up the number of directors to six. The three original directors resigned, and therefore three only were left. One of these tendered his resignation some time before the 28th of October, but no act was done until that day. Upon the 26th of October the defendant applied for shares, and upon the 28th of October the two remaining directors resolved that fifty shares should be allotted to the defendant, and that he should be appointed a director, and ultimately that the resignation of Fry, the retiring director, should be accepted. I am not prepared to say whether for a few minutes there were four directors of the company; and it is immaterial to consider whether Fry continued to be a director until the end of the meeting; for the defendant did not become a director until the shares were allotted to him, and in either view the allotment was made to the defendant by two directors only. Having been elected a director, he attended a meeting subsequently held; he then confirmed the allotment to himself, he concurred in an order made upon the company's bankers, and agreed to a certain mode of raising money for the company's benefit. The defendant therefore acted as a director, and joined in these proceedings as a member of the board. These circumstances having taken place in October and November, the defendant afterwards withdrew his application for shares, and refused to pay the amount of the call made in respect of them.

I will next proceed to consider the constitution of the company, for the question being whether an action lies to recover this call, it is necessary to ascertain whether it was good and well founded

in point of law. The memorandum and the articles of association are before us, and I assume that the counsel for the parties have drawn our attention to what is material. The 2d article provides that the "board," that is, the board for the transaction of business for the company, shall consist of the directors. By the 62d article the business shall be managed by the board. By the 68th article the number of members upon the board is not to be less than three nor more than seven. The 69th article deals with the qualification of directors, and no person without a qualification shall be a director. By the 70th article the subscribers to the memorandum of association shall be the first directors, and shall have power to add to their number. The expression "first board" seems to show that no previous board had existed. By the 72d article any casual vacancy may be filled up by the board. "Any casual vacancy" means any vacancy not occurring by effluxion of time, that is, any vacancy occurring by death, resignation, or bankruptcy. In the event of a casual vacancy the continuing board may act. If Fry's resignation created a casual vacancy, in my opinion the two remaining members of the board might act. Upon the true construction of the articles I think that no quorum was ever legally constituted under the 74th article, because by force of the 70th article the board cannot come into existence until after the appointment of the directors, and the board did not exist when the quorum was appointed. The plaintiffs cannot rely upon this point. But how does the matter stand in other respects? I think that the board still consisted of three directors, because Fry's resignation had not been accepted when the defendant applied for shares; but I will assume that there were only two directors. It has been argued that the proceedings as to the allotment made to the defendant were invalid, and that there being no quorum the board could not act. But if there were three directors, the two acted as the majority of the board. If there were two directors only, the two were acting during a casual vacancy. The board does not come to an end because a casual vacancy occurs. If any other construction were adopted than that which I have put upon these articles, a board of three directors must cease to exist upon the accidental death of one of its members, and the whole affairs of the company must come to a standstill. I do not see any reason to drive me to that conclusion. I will consider the contention that the resignation of Fry did not create a vacancy until it was accepted. Even according to that view the defendant cannot escape from liability, for the board must act by a majority, and until Fry's resignation was accepted the board did act by a majority, and did by a majority allot these shares to the defendant. These considerations are sufficient to dispose of the case and to show that the defendant must pay the amount of the call upon his shares. But although I think the first allotment good, I wish to remark that the defendant subsequently

recognized the allotment and agreed to pay for the shares. What took place at the meeting in November, was a good allotment and a good acceptance. These would bind him equally with the transactions upon the 28th of October. It has been contended that the defendant was not duly qualified to act as a director. I think that he did not require a qualification; he was appointed by the first directors, and therefore he fell within the provisions of the 69th article, which rendered it unnecessary for him to possess a qualification. Even if this were not so, he was within 25 & 26 Vict. c. 89, s. 67, which is substantially the same with a previous enactment, and he fell also within the latter half of the 76th article. These provisions are equally applicable, and render valid whatever acts have been done by the defendant as director. The absence of a qualification as director is immaterial. It has been contended that the supposed defect in the appointment of the defendant as a director has not been "afterwards discovered," within the meaning of the 76th article and of 25 & 26 Vict. c. 89, s. 67, and reliance has been placed upon the authority of Lord Chelmsford in Murray *v.* Bush, Law Rep., 6 H. L. 37, at p. 53. But in that case Lord Cairns (pp. 69, 70), and Lord Hatherley (pp. 76, 77), dissented from the view of Lord Chelmsford. The question material to the present case was as to the true construction of 7 & 8 Vict. c. 110, s. 30, which as I have already intimated, is substantially the same with 25 & 26 Vict. c. 89, s. 67. I feel myself bound to follow the opinions of Lord Cairns and Lord Hatherley, for the decisions of the House of Lords are technically binding upon us; and there being a difference in the views of the Peers present, the judgment of the House was given according to the opinions of the two Lords whom I have last mentioned. This gets rid of the question of disqualification. The only remaining question argued before us is whether, if he had not been properly appointed a director, he was estopped from setting up that defence. Two cases have been cited during the argument as bearing upon this question, In re Great Oceanic Telegraph Co., Harward's Case, Law Rep., 13 Eq. 30, before Malins, V. C., and In re British and American Telegraph Co., Fowler's Case, Law Rep., 14 Eq. 316, before Bacon, V. C. These cases, especially that before Malins, V. C., are very much in point. The judges who decided them would have held that an estoppel existed in the present case, and that the defendant could not deny his liability as a director. I think that even without the opinions of these learned persons I should have held that there was an estoppel; however, it is unnecessary for me to express any opinion, and I need only say that as to estoppel I am not prepared to differ from Manisty, J. But I prefer to rest my decision upon the other grounds which I have mentioned.

It remains only to consider whether our decision conflicts with the authorities cited to us: it is easy to produce authorities in

which somewhat similar questions have been raised, but when they have been examined, they are found not to have been decided upon the same governing words, and none of the authorities cited can be considered as guides for our decision. In Howbeach Coal Co. *v.* Teague, 5 H. & N. 161; 29 L. J. (Ex.) 137, the directors never had been lawfully appointed, and there was no proper quorum: the minority of the subscribers to the memorandum of association could not bind the shareholders: the body making the call was incompetent. In the case before us, for the reasons which I have given, it seems to me that a number of directors competent to make a call existed. In the case of in re Alma Spinning Co., Bottomley's Case, 16 Ch. D. 681, a proper number of directors had been appointed; but this number had been reduced by death and insolvency, and the vacancies had not been filled up; and Jessel, M. R., as it seems to me, properly held that the number of directors having been reduced below the lawful number, they could not bind the shareholders by their acts. I am unable to agree with the view taken by Jessel, M. R., of Kirk *v.* Bell, 16 Q. B. 290; the judges of the Court of Queen's Bench there proceeded upon a different ground, and they decided that there was not a quorum competent to transact the extraordinary business of the company. In my view Kirk *v.* Bell, 16 Q. B. 290, and in re Alma Spinning Co., Bottomley's Case, 16 Ch. D. 681, are not in point for our decision. Before I conclude, I may point out that some of the reasons given by me derive great support from Thames Haven Dock and Railway Co. *v.* Rose, 4 Man. & G. 552. That case shows that the business of the company does not come to a standstill because the proper number of directors does not exist. I am aware that that case is different from the case before us in its facts, but the judges of the Court of Common Pleas overruled the cogent argument addressed to them, and some of them at least were of opinion that the enactment as to the number of directors was directory only.

I have found it necessary to consider the case at length; but for the reasons which I have given, I think that Manisty, J., was right.

BRETT, L. J.—I will shortly go through the facts and the arguments in the case, in order to show that I agree entirely with the Lord Chief Justice.

This is an action to recover the amount of a call made upon shares; and it has been contended for the defendant that no valid allotment of shares was made to him, and many objections have been urged as to the proceedings of the company. It has been argued that the directors, Heseltine, Everitt, and Fry, were not duly appointed, and if the facts had been the same as in Howbeach Coal Co. *v.* Teague, 5 H. & N. 151, 29 L. J. (Ex.) 137, it would have been necessary for us to consider whether that case could be

supported; but in that case only three of the subscribers to the memorandum of association appointed the directors, whereas in the case before us four of the subscribers elected three directors, and the others were elected by these three; the directors therefore were elected by a majority of the subscribers; and I know of no rule of law preventing the majority of a body from binding the minority. It may be said that the appointment of Heseltine, Everitt, and Fry was invalid, unless they had a qualification; but I think that they were added to the number of "first" directors within the meaning of the 69th of the articles of association, and that they did not need any qualification. It has been further contended that on the 28th of October only two directors existed. I agree that no valid quorum had been appointed, and that there was no power to act by a quorum; but if the board consisted of three members, two of them, being the majority, might act; for the articles of association direct that the board shall consist of not less than three directors, and that the business of the company shall be transacted by the board, and I think it sufficient that the majority acted. Then Fry's resignation created a casual vacancy within the meaning of the 72d article, and it was lawful for the continuing board to act until the proper number of the board should be filled up. This circumstance makes a difference between the present case and all the others cited before us, in which the powers of boards of directors have been discussed. Moreover the defendant was present at the meeting in November, and it seems to me that what then happened was sufficient to bind him. Suppose that he had made no application for shares; what then took place was equivalent to an allotment to, and an acceptance by, the defendant of the shares. He joined in the allotment to himself. It has been argued that is insufficient, because at the meeting in November only two directors of the company existed, if the defendant had not previously become a director, and the two directors were insufficient to appoint a third; but I think that this objection is disposed of by the same reasoning as I have already used against the other objections urged on behalf of the defendant. But I will assume that the defendant was not qualified to be a director, and that he did not accept the shares at the meeting in November; nevertheless he acted as a director, and did so bona fide and with the intention of discharging the duties of a director. Under this state of circumstances I think that the reasoning of Lord Cairns in Murray *v.* Bush, Law Rep., 6 H. L. C. 37, at pp. 69, 70, applies. I prefer to follow the doctrine laid down by him rather than that laid down by Lord Chelmsford in the same case. I think that the defendant was bound by his acting as director; in this point of view also it must be taken that he joined in the allotment to himself, and I think that he is estopped from denying his liability. I feel more strongly upon this point than the Lord Chief Justice

appears to do. As to this question, and with regard to the cases cited before us, I wish to say that I am unable to agree with Howbeach Coal Co. *v.* Teague, 5 H. & N. 151, 29 L. J. (Ex.) 137, but I agree with in re Great Oceanic Telegraph Co., Harward's Case, Law Rep. 30 Eq. 316, and in re British and American Telegraph Co., Fowler's Case, Law Rep. 14 Eq. 316; these cases show that the defendant must be taken to have allotted to himself and to have accepted the shares. The facts fall within the ordinary rule of estoppel, and the defendant cannot be allowed to say either that the shares were not allotted to him, or that he did not accept them.

Upon all the grounds which have been argued before us, the appeal must be dismissed.

HOLKER, L. J.—After the elaborate judgment delivered by the Lord Chief Justice, and after the remarks of Brett, L. J., I do not propose to go into the facts. I wish, however, to make a few observations as to the power of the board of directors to act by a majority. Upon turning to the articles of association, I find by the 2d that "board" means the directors assembled for the transaction of business; by the 62d "the business of the company shall be managed by the board;" by the 68th "the number of the board shall not be less than three nor more than seven." It is said that when the board consists of three members, it is sufficient if the majority act on behalf of the board. In my opinion the better view is that the articles of association direct that the business of the company shall be managed by not less than three directors, and that the shares must not be allotted by less than three. I think that the business of the company cannot be said to be managed by the minimum number allowed by the articles, when one person is absent; it would not then be a board of three.

In all the other reasons of the Lord Chief Justice and Brett, L. J., I substantially concur.

Appeal dismissed.

WILKINSON

v.

HULL, ETC., RAILWAY AND DOCK COMPANY.

(*L. R.*, 20 *Chan. Div.* 323. *March* 10, 1882.)

Lands required by a railway company for accommodation works are lands required for the purposes of "the undertaking" or "of the railway."

Every work which a railway company is empowered to do, not merely what it is compelled to do, is a purpose of the undertaking.

The word "necessary" in the 68th section of the Railways Clauses Consolidation Act, 1845, refers to the obligation to make good the interruption,

and does not confine the company to any particular mode of doing the works. Where there are several modes of doing the works, the company, acting under the advice of their engineer, are the sole judges which mode should be adopted; but if they do not act bona fide the Court will interfere.

A railway company having intersected the lands of two adjoining landowners, A. and B., by an embankment, proposed to connect the severed portions of A.'s land by an arch through the embankment, and to give B. a right of way through the same arch, which they proposed to connect with his land by an occupation road carried through A.'s land. The strip of A.'s land proposed to be taken for this road was included in the lands delineated. A. objected to this arrangement as being beyond the powers of the company:

Held **(reversing the decision of Kay, J.), that the company had power to take the strip of land compulsorily for the proposed purpose.**

The plaintiff and Mr. Davey were the owners of two adjoining fields near Hull, across which, on an embankment, the Hull, Barnsley, and West Riding Junction Railway was intended to pass diagonally, as shown in the plan. The company was established in 1880 by the statute 43 & 44 Vict. c. cxcix., which incorporated the Lands Clauses Consolidation Act and Railways Clauses Consolidation Act, 1845. It was originally intended to give each of the two landowners a separate occupation bridge, or archway, under the embankment; but the company afterwards proposed to place Mr. Wilkinson's bridge near the boundary of the two fields, and to take two small pieces of his land on each side in order to give Mr. Davey access to the bridge, and they accordingly served Mr. Wilkinson with notice to treat for these two pieces of land, being those shaded in the plan. Mr. Wilkinson brought an action to restrain the company from taking proceedings under their notice to treat, and moved, before Mr. Justice Kay, for an injunction accordingly.

The piece of land proposed to be taken was included in the lands delineated in the company's act; by the 5th section of which the company were empowered "to take and use such of the lands delineated as might be required for the purposes of their undertaking." Affidavits were filed by the engineer of the company in which he stated that the works proposed were, in his opinion, reasonable and proper accommodation works, and the mode in which it was proposed to make them was a reasonable, proper, and usual mode of making them; and further, that the said land was bona fide required for the purpose of the said works. He also stated that it would be impossible to construct an archway on Mr. Davey's land without either altering the level of the railway or lowering the road below the level of the ground, which would be attended with great expense, and in the latter case the road under the archway would be liable to be flooded by accumulations of water.

The motion was heard before Mr. Justice Kay, on the 17th of February, 1882.

Ince, Q. C., and Solomon, for the plaintiff.

Macnaghten, Q. C., and Borthwick, for the railway company.

KAY, J.—This case involves a question of considerable interest and importance which I should certainly hesitate to decide upon an interlocutory motion if it were not that both parties desire me to do so, and that I have been much assisted by the very able argument on each side. [His Lordship then stated the facts of the case.] Of course the question is whether the company have power under their act of Parliament to take those strips of land. I am told that their act is in the usual form which was observed upon in Lord Beauchamp *v.* Great Western Ry. Co., Law Rep., 3 ch. 745; and that the same or equivalent words are in the special act in this case; and, therefore, the question is whether these two additional strips of land on each side of the embankment of the railway which the company now propose to take are, within the meaning of the Railways Clauses Consolidation Act, "necessary for the purposes thereof," which, as Lord Hatherley says, may be taken as meaning either "for the purposes of the company," or "for the purposes of the acts empowering the company." Now the question in that case came before the Court of Appeal in a rather different form. [His Lordship then stated the facts of that case, observing that it was an application to the Court to treat a piece of land through which the railway company had made a road as superfluous land, because according to the argument the company could not have taken it compulsorily, and, therefore, it must be treated as superfluous land, and so belonged either to the adjoining landowner, or anybody who was entitled. Lord Hatherley said that this was not the simple case of actually taking a piece of land for the purpose of making the road, but it was the case of making a road over land which had been originally taken for the purpose of making an embankment. His lordship then read the principal parts of the judgment in that case, observing that it was evident that the Clerkenwell trustees had land on the other side of the railway to which communication might be made by an archway, and that in the supposed case there would have to be a tunnel going lengthways under the line in the course of the old road, and that Lord Justice Selwyn seemed to agree in the decision. His lordship then proceeded:] I read that case as establishing these propositions. Making accommodation works is an act which the company are by the sixty-eighth section of the Railways Clauses Consolidation Act, 1845, compellable to do. If the only way of doing this is by taking the land of a third person, they may take that land under their compulsory powers. If there are two modes of doing them, one extremely inconvenient to the landowner, and costly to the company, and another more convenient to the landowner and cheaper to the company, which latter mode involves taking land but the former does not, they may still take the land. But if there is a mode of making a communication which is more convenient to the landowner, but not equally convenient to the

railway company, then they may not take land for the purpose of making another communication which is more convenient to them. And that seems to me, if I may venture to say so, a very sensible construction of the Act; because in that last case they are not taking land for the purposes of the Act, and are not taking land for anything which they are liable to do under the Act, but they are taking land for their own convenience, and for the purpose of enabling them to make a communication, not in the ordinary way, but in a way which will save their own pockets.

Now these are the principles of law, by which, as it seems to me, I am bound according to that decision, and which I must apply to this case. And what is it that the railway company are proposing to do here? In the case of land severed by an embankment, the obvious and most convenient mode to the landowner would be to make an archway. To give him a roundabout passage through another man's land by an archway not immediately communicating between the two severed portions of his land, cannot possibly be as convenient a mode of communication as to make an archway on his own land; and I think it is quite obvious, and I do not think it was at all denied, that the purpose of the railway company is, not to provide the landowner with a more convenient communication, or indeed with a communication equally convenient, but their real purpose and object is to escape an expense of £1,000, and to do that which is cheaper and more convenient to themselves. Part of the argument addressed to me as to the possible inconveniences which might occur from a severance of small pieces of land, and so on, seems to me to be completely answered by the ninety-third and ninety-fourth sections of the Lands Clauses Consolidation Act, which provide for the purchase of severed portions of land. [His lordship read the sections.] So that in this very case the argument which was used that the railway company may be put to very considerable expense in making that which I will call the obvious communication, is not any argument against the view taken by Lord Hatherley; because the answer is that they are not compelled to make the archway, they may take the whole land, and having bought it they may sell it again, perhaps as improved land, and so realize the price which they paid.

Therefore I come, on the whole, to the conclusion that they are not compellable to make these approaches in this way; it is not the most convenient way for the owner of the portions of that land so severed, and the taking these slips of land, therefore, is not a taking for the purposes of the act, but is a taking for the purposes of the company, to save them the expense of making the obvious and more convenient communication.

I accordingly repeat what Lord Hatherley intimates is the law, with which I respectfully say I entirely agree, that the company has no power to take compulsorily land for the purposes of its own

convenience, and, therefore, I must grant the injunction which has been asked for in this case.

From this order the defendants appealed. The appeal was heard on the 9th of March, 1882. Before the hearing of the appeal an affidavit was filed by Mr. Davey in which he said that the plan proposed by the company would be more convenient to him than that proposed by the plaintiff, and that he had no objection to it.

Macnaghten, Q.C., and Borthwick, for the appellants.

Under the Railway Clauses Consolidation Act, 1845, s. 68, we are compelled to make necessary communications for the benefit of lands the use of which is interrupted by our railway. We are doing what is necessary, not merely something which it is economical to us to do, as in Fenwick *v.* East London Ry. Co., Law Rep. 20 Eq. 544, and Pugh *v.* Golden Valley Ry. Co., 15 Ch. D. 330. The making accommodation works is one of the "purposes of the acts." Lord Beauchamp *v.* Great Western Ry. Co., Law Rep., 3 Ch. 745. The company are the judges within reasonable limits as to the way in which their works can best be carried out, and the evidence here is strong that the mode which the company is adopting is the most reasonable way.

They were then stopped by the court.

Ince, Q.C., and Solomon, for the plaintiff:

This case is within the principle of Eversfield *v.* Mid-Sussex Ry. Co., 1 Giff. 153; 3 De G. & J. 286, which is, that the company is not entitled to use its compulsory powers so as to carry out its works in the most economical way without regard to other considerations. There is a chain of cases, commencing with Dodd *v.* Salisbury and Yeovil Ry. Co., 1 Giff. 158, establishing that a company cannot use its powers to accomplish a subsidiary object. Vane *v.* Cockermouth, etc., Ry. Co., 13 W. R. 1015, is an instance of this. Although the words of sec. 16 are very general, the company must show that the works to be done are necessary for the purposes of the undertaking, otherwise the compulsory powers do not arise. In the present case the engineer does not certify that the proposed works are necessary, but only that they will cost the company less than if the arch was made through the other part of the embankment. That is not sufficient. The company have no right to inconvenience or injure landowners merely to save themselves expense: Lord Beauchamp *v.* Great Western Ry. Co., Law Rep. 3 Ch. 745; Pugh *v.* Golden Valley Ry. Co., 15 Ch. D. 330; Reg. *v.* Wycombe Ry. Co., Law Rep., 2 Q. B. 310; Stockton and Darlington Ry. Co. *v.* Brown, 9 H. L. C. 246.

JESSEL, M. R.—This is an appeal from a decision of Mr. Justice Kay with respect to the rights of a railway company to take land. The railway company gave notice to take two strips of land adjoining to their railway, which strips of land are within the limits

of the land which they have power to take compulsorily for the purposes of their railway. The landowner objects and says; "You are going to take this land for the purpose of making a communication between the lands of an adjoining landowner, Mr. Davey, whose lands you have severed; you can make that communication otherwise by means of an arch on his land; you are not entitled to take my land, for it is not required for the purposes of your act." That is the contention. It appears to me that when you look at the act of Parliament that contention is not well founded. The real question is, whether taking the land for this purpose is taking the land for the purposes of the railway—for the purposes of the undertaking. Now, independently of the decisions, I should have come to the conclusion, from the words of the Railway Clauses Consolidation Act itself, that taking land for the purpose of making accommodation works, which the company was liable to make, or even had power to make, was a taking of land for the purposes of the undertaking and of the Act. The sixteenth section of that Act says, "subject to certain provisions, it shall be lawful for the company, for the purpose of constructing the railway or the accommodation works connected therewith hereinafter mentioned, to execute any of the following works." There we find no distinction whatever between the railway itself and the accommodation works, they are classed together, and under the word "railway" has always been included all such works connected with the railway proper as the company have power to construct. As regards accommodation works, I do not find anything in the Act which negatives this, that the company may make a bargain, as they constantly do, with landowners as to the accommodation works they are to construct, but when we come to the sixty-eighth section there is a compulsion on the company to make certain accommodation works. Now what are they? The section says, "The company shall make and at all times thereafter shall maintain the following works for the accommodation of the owners and occupiers of land adjoining (that is to say), such and so many convenient gates, bridges, arches, culverts, and passages over, under, or by the sides of or leading to or from the railway as shall be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway shall be made." It appears plain to me from the language of the act that the word "necessary" applies only to the making good interruptions, and supposing they can make good the interruptions in two or three ways, who is to choose? Clearly the company, that is, the company acting under the advice of their engineer. They are to choose which way the works are to be done. If the way proposed is not convenient to the landowner he can apply to the magistrate under the sixty-ninth clause; but assuming each way is convenient, that is, that they

the limit of their powers, why should they not buy the land? It is exactly within the purview of the act, and to carry out one of the purposes of the Act. If there had been no authority, as I said before, I should have arrived at the same conclusion; but it appears to me the case of Lord Beauchamp *v.* Great Western Ry. Co., Law Rep. 3 Ch. 745, is a most distinct authority. In that case the company had bought the land in question for the purpose of making an embankment. They abandoned their intention as to making the embankment. What was the result? If they had not wanted the land for any other purposes of their act it would have become superfluous land, but they said, "We do want it for another purpose, we want it to connect severed land of the Vestry of Clerkenwell." They had been taking this land from Lord Beauchamp, and the case was decided on that ground only, that is, that they could have taken it for that purpose originally, and therefore that they might keep it for that purpose. It was not decided on the ground that they had already bought it and could keep it, but it was because they might have bought it for that purpose and could use it. In that case Lord Beauchamp's land lay between two portions of the land of the Vestry of Clerkenwell, and the company proposed to connect the lands of the Vestry of Clerkenwell which had been severed by the railway by making an occupation road through the land of Lord Beauchamp. It is the exact case we have here. In fact I can see no distinction between the two cases. It was suggested there as it is suggested here, that the communication could be made in another way. No doubt it could. But it was said, and said very truly, that to make the communication through a horseshoe arch, which was the way that they proposed, would be inconvenient, that is, comparatively inconvenient. It was not suggested that the arch would not have restored the communication which had been interrupted, nor was it suggested that cattle and people could not walk through the arch without inconvenience, but what I understand Lord Hatherley to mean is, that it would be less convenient and more expensive if the company were compelled to do it, and he said they had the choice. In the present case we have similar evidence. Both the engineer and the neighboring landowner say what they propose to do would be more convenient. That is a matter of opinion, but it is a matter which the company or the engineer who advises it is entitled to settle. What Lord Hatherley says is (Law Rep. 3 Ch. 749), "What duties are imposed upon the company by the general act?" Then after reading the 68th section he says: "Now a case might well occur which would not be very different from what has occurred here, the case of two fields on the eastern side of the railway, being the whole property of the landowner, and having their only communication over a narrow strip of land running north and south, and of the company taking this strip for the purposes of their act so as entirely

to block up the communication; the company then would be compelled to find accommodation for the owner, and if they could not acquire the land of a third person for the purpose of effecting the communication, they might be brought to a standstill, or obliged at great expense to make an inconvenient communication by means of archways passing under the line." Now we were gravely asked to construe that in this way, that they might be under the obligation to make something that is not convenient. That is in the very teeth of the words of the Act. His Lordship could not have meant that. Their object is to make convenient arches, etc. He did not mean that they were under the obligation to make an inconvenient communication. What he meant was, it was enough that they are doing something much more convenient and much better than what they could have done if they had not acquired the land. Then he says (Law Rep. 3 Ch. 750): "It was argued that if the company could take Lord Beauchamp's land for the purpose of a communication between the severed lands of another landowner, they would be entitled to cut Lord Beauchamp's land in two by making a communication through the middle of it, and that this unreasonable result shows by reductio ad absurdum that such a power cannot exist. The answer to that is, that though the company while acting bona fide are the sole judges what land they require for the purpose of their works, the court can interfere when it sees mala fides, and the making the communication in the way suggested clearly would not be bona fide. Then the question is whether the making accommodation works, which the company are compelled to make, is one of the purposes of their acts? I take it that whatever they are compellable to do is a plain purpose of their act, though it may be well argued it is not a purpose of the act to do for their own accommodation anything which they are not compellable to do, and accordingly, though the 45th section of the Railways Clauses Consolidation Act gives power to purchase land for extraordinary purposes, it does not give the company power to take it compulsorily, the acquisition of land for those extraordinary purposes not being essential to the undertaking." As I said before, I go further than that. I say whatever the company has power to do they may take the land for; but in the present case the company are doing that which they are compelled to do, and which it has been decided that they may take the land for. That is, as I said, according to the decisions; but at the same time I repeat that if there had been no such authorities I should have come to the same conclusion.

COTTON, L. J.—I think the order appealed from was wrong and must be discharged. That order restrains the company from taking certain lands. By the private act the company has power to take all lands, within the prescribed limits, which may be required

for the purpose of the undertaking, and the simple question we have to consider is, of course having regard to the decided cases, whether this land is required for the bona fide purposes of the undertaking, and the purpose of the undertaking for which it is said to be required is to provide accommodation works which the 68th section of the Railways Clauses Consolidation Act incorporated with the special act requires the company to make.

Now I quite agree with the Master of the Rolls that it is not necessary to show that the works in question are required to be made, that is to say, that the company can be compelled to make them. In my opinion everything which is reasonably required for the purpose of completing the undertaking which the company are authorized to make, is land required for the purposes of the undertaking; but here it is subject to the questions which have been raised.

Accommodation works are works which the company are not only authorized to make, but which they are required to make. The section requires that they shall make so many convenient gates, arches, and passages as shall be necessary for the purpose of making good any interruptions caused by the railway.

I mention here—because I think that (possibly in consequence of the affidavit of Mr. Davey now before us not being then before the court) Mr. Justice Kay has dealt with the case as if this was not a convenient mode of restoring the communication for Mr. Davey, whose lands have been intersected—that there has been an affidavit filed since the motion was before Mr. Justice Kay, which states that Davey is perfectly satisfied with this, and states also that in his opinion it is more convenient than the ordinary mode which would be possible, namely, making an archway under the embankment immediately connecting the severed portions of his land. If there were not that affidavit, it might be a question whether the landowner is satisfied with this mode of communication, and he might take the proceedings pointed out by the Act; but even if there had not been that affidavit, I should say we are not to consider the landowner unless he is objecting.

We are to consider whether, without any objection by him, and any evidence before us, we should be justified in saying that this land is not required for any purposes of the undertaking. To say that to enable the company to take this land it must be shown that it is necessary to take it, is rather an erroneous way of arguing on the 68th section. The communication is to be such as is necessary for restoring the interrupted communication between the intersected lands,—necessary, that is to say, to restore in a convenient and proper way, having regard to the facts of the case, the communication between the lands, and when once that is established, the long series of cases, as well as common sense and principle, lay down that you must leave the engineer of the company, who is intrusted

with the power of executing the works authorized by the Act of Parliament, the duty of determining in what particular way the company will do that which is authorized by the act. Here it cannot be doubted that an arch somewhere under the embankment of the railway company is required and is necessary for the purposes of restoring the communication. When once that is arrived at, taking the principle laid down by Lord Cranworth, that for the purpose of doing that work which is authorized by the Act of Parliament the engineer must determine what land is required for the purpose, this order is shown to be, in my opinion, erroneous. A great deal of stress was laid on that word "necessary;" but in the passage from the judgment in Stockton and Darlington Ry. Co. *v.* Brown (9 H. L. C. 246) quoted by the Master of the Rolls, Lord Cranworth says that discretion must be left to the engineer. So that even if the word "necessary" which is found in the 68th section had been the word used in the special act in the clause giving them the power to take lands, the result, in my opinion, would have been just the same. But we are not driven to that. In this act it is simply that this is "required for the purposes of the undertaking," the undertaking including the accommodation works and those being necessary, it is, having regard to the decided cases, for the engineer of the company to say what land is to be taken.

It is said that it would lead to an absurdity, that you might have an engineer certifying that a strip of land was required for an entirely unreasonable purpose. But what is left to the discretion of the engineer is limited by the decided cases and common sense. If you see he is taking land which is not required for the purpose of restoring the interrupted communication, then the court ought to come to the conclusion that he is not acting in an honest exercise of the discretion left to him, but for some other purpose, and will not then give that weight to his affidavit which will be given to it when the court sees no ground for supposing he is acting otherwise than honestly.

I would add a few words about the case that has been pressed upon us of Pugh *v.* Golden Valley Ry. Co., 15 Ch. D. 330. It was suggested that the case was in favor of the order of Mr. Justice Kay. In my opinion that is not so. The decision there was that the railway company, coming on a river very much winding, the course of that winding river being crossed by the railway, had no power to divert it so as entirely to take it away from one side of their railway. And on what ground? It was that the 16th section must be read reddendo singula singulis, that when in making a railway it is necessary to divert the river, then the diversion may be made; if it is necessary to cross it, then the crossing may be made, but the mode of the diversion and the mode of crossing, when it is ascertained that that is the way which is necessary for the construction of the railway, is left entirely to the discretion of the engineer.

This, as I understand, is the meaning of what was said by Lord Justice Thesiger in giving the judgment of the court; what he says is this (15 Ch. D. 337): "A railway company in the course of the construction of the line of railway authorized by the special act, will, from time to time, arrive at a point where a river or stream of water, or a road, street, or way, obstructs the further progress of the works. The course or level of the obstruction will be such as naturally to require its being carried sometimes over, at other times under, and at other times by the side of the railway, and whichever of these three modes may in the particular instance be the mode of dealing with the obstruction naturally requiring to be adopted, the company may, in order the more conveniently to carry out that mode, alter or divert the course or raise or sink the level of the river or stream of water, or of the road, street, or way constituting the particular obstruction; and the exact manner in which and extent to which, for the purpose mentioned, the company may carry out that alteration or diversion of the course, or raising or sinking of the level of the obstruction, is, by the words 'as they may think proper,' left to their discretion, which the courts will not interfere with if bonâ fide exercised."

In this case, from the nature of the interruption between the portions of Mr. Davey's land which have been intersected, an archway under the embankment and under the railway is necessary, and the mode of dealing with that necessity is left to the engineer if the company. It is for him to say in this discretion what will be the proper mode of giving a convenient archway or means of communication to Mr. Davey. Here there is reason for supposing that this is the most convenient mode, and there is no reason for doubting that the company are acting bonâ fide in adopting the course which, under the advice of their engineer, they have determined to adopt.

LINDLEY, L. J.—I am of the same opinion. It will not be necessary for me to add much to the remarks already made. The main question for us to consider is this, whether there are any grounds here for preventing the railway company from taking that piece of land which at present belongs to the plaintiff, Mr. Wilkinson. Of course, if they have no right to take it he is entitled to an injunction to restrain them from doing so. Whether they have a right to take it depends upon the true construction of the company's Act of Parliament, which alone can give them power to take land, and we must look at the language of that Act, and the language we have to consider more particularly is comprised in the 5th section of that Act, and that section authorizes the company to take such lands as are marked on the deposited plans and specified in the Act "as may be required for the purposes of the undertaking." Now what is meant by that expression? Let us first take

"for the purposes of the undertaking." Does the company seek to acquire this piece of land for the purpose of the undertaking? In order to answer that question we must see for what purpose they are seeking to acquire it, and when we look into the facts of the case, the purpose for which they seek to acquire it is the construction of a passage for the accommodation of Mr. Davey whose lands they have intersected by an embankment. Is that a purpose of the undertaking? I take it it is quite plain it is. Is it bonâ fide for that purpose? Is it sought to be acquired for that object, or for some other object under cloak of that apparent object? The bonâ fides in that limited sense are not really in dispute. We come so far, therefore, on the road, that, whether required or not, the company are seeking to take it bonâ fide for the purpose of their undertaking. But that is not enough. The plaintiff says, "But it is not required for that purpose." The argument of the plaintiff is this: "It is not required for that purpose, it is not necessary for that purpose, because the company can attain the same purpose in some other way." It appears to me that this argument when looked at is suicidal and destructive. The object is a legitimate one and a proper one. Supposing there are half-a-dozen ways in which the object may be accomplished, you may say of any one of those half-a-dozen that it is not necessary because there are five other ways of doing the same thing, and so you can go by parity of reasoning from one to another, and thus negative each way of doing what is required. The true way to deal with this argument is as follows: if you once see that the object is a legitimate one and there are several methods of accomplishing it, you leave the company to decide which method is the best. I see no other practical mode of dealing with the argument, and I should come to this conclusion quite apart from all authorities.

Then when we look at the authorities, I think that we shall see that they are all in favor of this view, whether we take them historically from the beginning, or whether we confine ourselves to the more recent decisions. We must bear in mind that this is not a case of diverting roads or streams under the 16th section of the Lands Clauses Consolidation Act. The class of cases which bears upon the question is illustrated by the case of Eversfield *v.* Mid-Sussex Ry. Co., 3 De G. and J. 286, by the Stockton and Darlington Ry. Co. *v.* Brown, 9 H. L. C. 246, by Kemp *v.* South Eastern Ry. Co., Law Rep. 7 Ch. 364; Lord Beauchamp *v.* Great Western Ry. Co., Ibid. 3 Ch. 745; and if we look at those cases and consider the result, I think it comes to this: It is not sufficient for an engineer to say he wants this, that, or the other, for the purpose of the company, there must be some evidence to enable the court to test his opinion; there must be sufficient evidence to satisfy the court that what he says is wanted is bonâ fide wanted for some legitimate purpose; but the moment the court is satisfied

with the bonâ fides and honesty of the engineer, that is sufficient; and it seems to me that this particular case is exactly like Lord Beauchamp v. Great Western Ry. Co., Law Rep. 3 Ch. 745, and the other cases as regards the general principle of construction. I cannot see any distinction between the case of Lord Beauchamp v. Great Western Ry. Co. and this case. That case has been so much commented upon that I need not pursue it further. For these reasons, I am of opinion that the appeal should be allowed, and that the order of Mr. Justice Kay granting the injunction must be discharged.

CALEDONIAN RY. Co., appellants.

WALKER'S TRUSTEES, respondents.

(*L. R., 7 App. Cas.* 259.)

The 6th section of the Scotch Railways Clauses Act of 1845 (similar in the English Act), provides, inter alia, that the railway "company shall make to the owners and occupiers of, and all other parties interested in, any lands taken, . . . or injuriously affected by the construction thereof, full compensation for the value of the lands so taken, and for all damage sustained by such owners," etc. And it then cites the Lands Clauses Consolidation (Scotland) Act 1845, as the machinery by which compensation is to be adjudged.

In order to found a claim for compensation under this section, some special or peculiar damage must be done to the lands by reason of the construction of the works, which diminishes the value of the lands, which damage would have been the subject of an action at law before the statute.

Where, therefore, an access to private property by a public highway or private way is interfered with by the construction of the works, and the value of the property, irrespective of any particular use which may be made of it, is so dependent upon the existence of that access as to be substantially diminished by its obstruction, then the owner is entitled to compensation for such interference.

But no compensation is given for damages if the thing done was one for which, if done without any statutory power, no action could have been maintained; nor when a right of action, which would have existed if the works had not been authorized by statute, would have been merely personal. Nor when damage arises, not out of the execution, but only out of the subsequent use of the works. Nor for the loss of trade or custom by reason of a work not otherwise affecting the house in or upon which the trade has been carried on.

Trustees were possessed of a spinning mill ninety yards from an important main thoroughfare in Glasgow, having parallel accesses on the level from two sides of the mill to the thoroughfare.

A railway company under their special Act cut off entirely one access, substituting therefor a deviated road over a bridge with steep gradients. And the other access they diverted and made less convenient. But none of the operations were carried on ex adverso the premises. When the bill was before Parliament the trustees were induced to withdraw their opposition in consideration of an agreement, by which the company undertook, that in the event of the land of the trustees and of others being injuriously affected by

the construction of any of the works proposed by the bill, their claim to compensation should not be barred by reason of the company not taking part of their land. The trustees claimed compensation for the diminished value of their premises by reason of the detour and gradients:

Held, affirming the decision of the court below, that though the agreement gave no right to compensation, the trustees were entitled to it under the Railways and Lands Clauses Consolidation (Scotland) Acts, 1845.

Per LORD SELBORNE, L. C.—The obstruction of access to a private property by a public road need not be ex adverso, but it must be proximate and not remote or indefinite to entitle the owner of that property to compensation for the loss of it.

And—It is a question whether a mere change of gradient alone would be a proper subject for compensation.

Metropolitan Board of Works *v.* McCarthy (Law Rep., 7 H. L. 243) held undistinguishable.

The Caledonian Ry. Co. *v.* Ogilvy (2 Macq. 229) explained; and distinguished.

Chamberlain *v.* West End of London Ry. Co. (2 B. & S. 617), and Beckett *v.* Midland Ry. Co. (Law Rep., 3 C. P. 82) approved. Ricket *v.* Metropolitan Ry. Co. (Law Rep., 2 H. L. 175) examined.

Conflicting Decisions of this House.

Per LORD SELBORNE, L. C.—It is the duty of this House to maintain as far as possible the authority of all former decisions of this House: and although later decisions may have interpreted and limited the application of earlier, they ought not (without some unavoidable necessity) to be treated as conflicting.

And—All the above decisions of this House appear to be capable of being explained and justified upon consistent principles.

See remarks of Lord Blackburn as to the cases of Ogilvy and McCarthy not being reconcilable, pp. 294, 302.

APPEAL, from the Second Division of the Court of Session, Scotland.

In 1873 the appellants, the Caledonian Ry. Co., applied to Parliament to make a new line of railway on the site of part of the west side of Eglinton Street, Glasgow (which is one of the main thoroughfares of that city) on the south side of the Clyde.

The respondents, Walker's trustees, are proprietors of a piece of ground lying to the west side of Eglinton Street, on which is built a cotton mill and relative buildings. It is in extent over 6000 square yards, and is bounded upon the north by Canal Street, on the east by Francis Street, and on the south by Victoria Street. The east front of the premises are parallel to, and ninety yards distant from, Eglinton Street.

Before the operations of the appellant company, Canal Street and Victoria Street, which are public highways and sixty feet wide, were level streets intersecting Eglinton Street at right angles, affording direct and easy access from both sides of the premises to Eglinton Street.

At a considerable distance north of Canal Street there is another street called Cook Street; but there was no communication between Cook Street and Canal Street except by Eglinton Street.

When the appellants' bill was before Parliament, the respondents, being of opinion that their property would be seriously injured by the proposed operations, with other owners of property in the neighborhood, petitioned against the appellants' bill. But when the bill was in dependence in the House of Lords the appellants offered to the respondents (and the others with them) the following undertaking, dated the 4th of July, 1873:

"Gentlemen: In consideration of your withdrawing all further opposition to this bill, we, the Caledonian Ry. Co., do hereby undertake that, if and so far as you are, in the judgment of the arbiters or oversman, or jury to be appointed under the Lands Clauses Consolidation (Scotland) Act, 1845, as after mentioned, injuriously affected by the construction of any of the works authorized by this bill, your claim for compensation shall not be barred by reason of our not taking any part of your respective lands, and the amount of such compensation, if any, if not agreed upon, shall be determined in the manner provided by the Lands Clauses Consolidation (Scotland) Act, 1845, for the determination of cases of disputed compensation; but without prejudice to all claims competent to you, or any of you, under and by virtue of the said Act, and of any other Acts regulating the construction of railways, in all cases where the lands of you, or any of you, or any part thereof, may be taken by us for the purposes of this Act."

The respondents, with the other petitioners, thereupon withdrew their opposition to the bill, which became law as the Caledonian Ry. (Gordon Street (Glasgow) Station) Act, 1873. The Lands Clauses Consolidation (Scotland) Act, 1845, and the Railways Clauses Consolidation (Scotland) Act, 1845, are incorporated with the Act.

In virtue of the powers contained in that Act, the appellants have converted into a line of railway the whole of the west side of Eglinton Street between Canal Street and Victoria Street, and for a considerable distance north and south of those streets, and they have thus destroyed both the accesses into Eglinton Street as they stood. They have formed a new street called Salkeld Street between the line of railway and the respondent's property, running southward from Cook Street, and nearly parallel to Eglinton Street, until it reaches a point between Francis Street and Eglinton Street, where it crosses the new line of railway by means of a bridge, and it then bends in a south-easterly direction towards Eglinton Street, which it joins.

Both Canal Street and Victoria Street are connected with Salkeld Street. The result of the operations is that the respondents' new access by Canal and Salkeld Streets as compared with the old one by Canal and Eglinton Streets to a common point, is 1485 feet longer; while their new access to Eglinton Street by Victoria and Salkeld Streets is 265 feet longer than the old one by Victoria

Street. The steepest gradient of Salkeld Street as compared with Eglinton Street is 1 in 34 compared with 1 in 59 in a corresponding portion of Eglinton Street, and the gradient of Victoria Street is made for 116 feet, 1 in 20, and for 197 feet, 1 in 34.7. The gradient of Canal Street itself, so far as it exists, has not been altered, and Victoria Street, so far as it is ex adverso of the respondents' property, is still on the level. No part of the respondents' property has been taken, and none of the operations have been carried on ex adverso of that property.

On the completion of the works in 1879, the respondents served upon the appellants the usual statutory notice to have the amount of their claim fixed by arbitration under the Lands Clauses Consolidation (Scotland) Act, 1845, nominating their arbiter, and called upon the appellant company to nominate theirs. This they did, but at the same time raised a note of suspension and interdict to have the parties interdicted from proceeding, on the ground that the claim of the respondents presented no case in law on which they could demand compensation.

In their record before the Lord Ordinary, the appellants averred that the respondents' property has sustained no permanent damage or peculiar physical injury, and although the respondents, in using Victoria Street as altered, have to use at some distance from their property a somewhat steeper gradient than before, they have to do this in common with all the members of the public who require to use the said street. And they pleaded, the respondents not being entitled to compensation either under the written undertaking or under any of the statutes, the note of suspension and interdict ought to be passed.

The respondents answered that they had a peculiar interest in Canal Street and Victoria Street, which formed the special and indeed only accesses to the property, and that the construction of railway walls "across the line of those streets cuts off the access between the respondents' property and Eglinton Street, the leading thoroughfare of the district, and necessitates a longer detour for all carts, carriages, and passengers coming to or leaving the respondents' works. The direct access which the respondents' property formerly had by the said streets to Eglinton Street rendered their property more valuable, and by the construction of the appellants' works it has been permanently damaged, and its value greatly diminished." And they pleaded, inter alia, the appellants having by their undertaking constituted arbiters the sole judges whether and to what extent the respondents' property is injuriously affected, they were bound to proceed with the arbitration; and the property having been injuriously affected within the meaning of the special act and the acts therewith incorporated, the respondents were entitled to have the same assessed in terms of the Lands Clauses Acts.

The Lord Ordinary refused the interdict on its merits. The Court of Session adhered, but reserved their opinion on the question of relevancy until the facts should be found by the arbiters.

The arbiters differed in opinion, and the oversman appointed had to pronounce an award, the material portions of which will be found in Lord Blackburn's opinion, Post. The oversman in the result found that the respondents' property was injuriously affected by the construction of the appellants' works; and on the assumption that they were legally entitled to compensation by the appellants for the injury so caused, fixed the pecuniary amount of the compensation at the sum of £1500, allocating £1200 in respect of damage by detour and £300 to compensation for damage by change of gradients.

The respondents then brought the present action for recovery of the sum awarded, maintaining that they were entitled to decree for the compensation assessed under the written undertaking, or, secondly, under the 6th section of the Railways Clauses Act of 1845,* which embodies the Lands Clauses Act, 1845, as containing the machinery by which compensation is to be adjudged.

On the 10th of November the Lord Ordinary, Lord Curriehill, sustained the oversman's award.

On a reclaiming note the Second Division by interlocutor, dated the 21st of January, 1881, adhered, their lordships being of opinion that if there had been no agreement between the parties, on the 6th section of the Railways Clauses Consolidation (Scotland) Act, 1845, the respondents were entitled to compensation. Court of Sess. Cas., 4th Series, vol. viii. p. 405.

On appeal.

Feb. 16, 17, 20. The Lord Advocate (J. B. Balfour, Q.C.) and Mr. Benjamin, Q.C. (with them, Mr. Horace Davey, Q.C.), maintained for the appellants that the decision of the court below was erroneous. The main question, as to compensation under the Railway Act, was whether the case fell under the principle of the cases of which Caledonian Ry. Co. *v.* Ogilvy, 2 Macq. 229, is the chief, or under the principle applied in Metropolitan Board of Works *v.* McCarthy. Law Rep. 7 H. L. 243.

The former case settled with respect to a level crossing, that that was not such an injurious affecting of the lands as would bring in a claim under the Railways Clauses Act, while in McCarthy's Case, Law Rep. 7 H. L. 243, the deprivation of a water frontage was held injuriously to affect under the statutes.

Here there were only the two elements of gradient and detour;

* 8 and 9 Vict. c. 33, s. 6, provides, "That the railway company shall make to the owners and occupiers of, and all other parties interested in, any lands taken or used for the purposes of the railway, or injuriously affected by the construction thereof, full compensation for the value of the lands so taken or used, and for all damage sustained by such owners," etc.

there was no interference with the immediate frontage, nor any interference with the levels of the streets ex adverso, or opposite the frontage. The oversman's finding (sect. 8) expressed the mixed question of law and fact, that the property is injuriously affected by means of the gradients and detour. Such a finding came to this, that any person who had to travel that part of the road, if he happened to have property near it, would be entitled to compensation. And it was difficult to see how there was any difference between the respondents and the world at large, except in this, that they would, living near it, suffer the inconvenience more frequently.

Unless there had been a limitation by implication or otherwise of the general principles of Ogilvy's Case, 2 Macq. 229, it must be held to apply here. There a public road was, under the sanction of an act of Parliament, crossed by the railway on a level, within fifty yards of the complainant's lodge, and gates were placed across the public road. *Held*, that he had no claim for compensation. Lord Cranworth said there that there was no damage at all to the estate, except that the owner of the estate would oftener have a right of action from time to time than other persons, inasmuch as he would pass the spot oftener. Chamberlain *v.* West End of London Ry. Co., 2 B. and S. 605 and 617, relied on by the respondents, was not like this when examined. There was there a special injury to the property, diminishing its value for a particular kind of use, and the access was interfered with in a manner quite different from here. And the arbiter found that the houses were deteriorated because the number of persons passing would be diminished, and consequently the prospect of customers to the occupiers of the houses. Here there was no finding that any person would go the less along Canal Street or Victor Street by reason of the alterations.

In Ricket *v.* Metropolitan Ry. Co. (May, 1877), Law Rep. 2 H. L, 175, Ogilvy's Case, 2 Macq. 229, was approved, and the reasoning of it was used as one of the media in reaching the result. There Lord Chelmsford, L. C., Law Rep. 2 H. L. at p. 187, to whom it seemed hopeless to reconcile the cases, said "that the criterion of a party's right to damages is correctly stated by Lord Campbell in re Penny and South Eastern Ry. Co., 7 E. & B. 660, 'unless the particular injury would have been actionable before the company had acquired the statutory power, it is not an injury for which compensation can be claimed.' At the same time the observation of Lord Cranworth in Ogilvy's Case, Law Rep. 2 H. L. at p. 190, must not be lost sight of, that 'it does not follow that a party would have a right to compensation in some cases in which, if the act of Parliament had not passed, there might have been not only an indictment, but a right of action.'" Then in proceeding to examine Ogilvy's Case he said, Law Rep. 2 H. L. at p. 190, "The

owner (Mr. Ogilvy) of the house had no other right over the road than that which belonged to the public generally, and the erection of the gates across the road, where the railway crossed it upon a level, was essential to the public safety. It is doubtful whether the owner of the house sustained any injury different in kind, though it might be greater in degree, from that of the rest of the public; and therefore it was questionable whether he could have maintained an action if the obstruction had been created without the authority of Parliament." Those words were directly applicable here.

Lord Chelmsford also said that the 6th section of the Railways Clauses (England) Act, 8 & 9 Vict. c. 20, and the 68th section of the Lands Clauses (England) Act, 8 Vict. c. 18, were both inapplicable, as Ricket's damage arose from the temporary operations of the company, and not from their permanent works; that the claim came under the 16th section of the former act. But no reason appeared to suppose that the decision would have been different if it had been a case of permanent injury.

[Lord Selborne, L.C.:—Throughout the 16th section refers to permanent as well as temporary damage.]

In that case Lord Cranworth, Ibid, at p. 198, laid it down that "Both principle and authority seemed to show that no case came within the purview of the statutes, unless where some damage had been occasioned to the land itself, in respect of which but for the statute the complaining party might have maintained an action. The injury must be an actual injury to land itself, as by loosening the foundations of buildings on it, obstructing its lights, or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration."

McCarthy's case, Law Rep. 7 H. L. 243, fell under this language, and Beckett *v.* Midland Ry. Co. (Nov., 1867), Law Rep. 3 C. P. 82, fulfilled all Lord Cranworth's requirements, and therefore the appellants did not quarrel with it. In Beckett's Case, Law Rep. 3 C. P. 82, the defendant railway company erected an embankment on a portion of a highway opposite the plaintiff's house, and thereby narrowed the road from fifty to thirty-three feet, thus, according to the evidence, materially diminishing the value of the houses for letting or selling. Carriages were compelled to go some distance beyond the plaintiff's gate before they could turn.

That was a special and peculiar injury to the frontage of the property, an injury that could not be common to the proprietor and to everybody else as well. And quite different from that here, where the gradients and detour commenced, not ex adverso but ninety yards away.

As far as the facts of McCarty's Case, Law Rep. 7 H. L. 243, went, they were totally different from this, and quite distinct from Ogilvy's Case, 2 Macq. 229. McCarthy was occupier of a house in close proximity to a drawlock which opened into the Thames. The

distance between his house and the top of the dock was twenty feet, and that space was taken up with a public road. The dock was entirely destroyed by the works of the Thames embankment, and McCarthy was found entitled to compensation on the ground that a special value was attached to the premises by reason of the proximity or relative position of the dock. Lord Cairns put it that the claimant had two highways—a highway by road and a highway by water in front of his premises. It was very difficult to say that that advantage of the water frontage so near his house was not a valuable appurtenant clearly connected with the land, and the deprivation of it might very well be described as an injuriously affecting of the property as distinguished from personal inconvenience. It was not a thing which everybody else could suffer in the same way or degree; it was peculiar to McCarthy's property.

The right interfered with must be ex adverso, or at least must have a degree of proximity to the affected property which made it, in a reasonable sense, an appurtenant of the property. See remarks of Lord Penzance, Law Rep. 7 H. L. at p. 263, who demands, as necessary to the claim, a degree of proximity to the affected frontage, which is not substantiated in the present case.

The test came to this, if you have such a special and peculiar relation between the subject that is damaged and the property, as is different from that enjoyed by the rest of the world, then your claim will arise; if you have not, then your claim will not arise. For instance, if the alteration of the level of the road was by lowering it, and the owner of the house had steps presented to him instead of the road, that interference is sharply distinguished from a case in which persons going along a road have to go up or down a gradient.

They submitted, as a result of all the cases, that although there were some expressions of opinion in McCarthy's Case, Law Rep. 7 H. L. 243, which, apart from other expressions, might be interpreted as enlarging the previously understood grounds of claim, yet when the cases and opinions are all read together, they do not warrant the existence of a claim like the present, where the use is a use like that of the rest of the public, and where, if any difference, it is a difference only in the amount of the use.

The arbiter had not separated his damage in respect of the gradients, and there may be a matter of difference in point of law between the gradient of the Canal Street access and the gradient arising from the bridge. An over bridge was a later statutory substitution for a level crossing—the provisions of the Railway Acts originally permitted them—but by the Railways Clauses Consolidation (Scotland) Act, 1845, s. 39, they are to be the exception, to avoid danger and inconvenience to the public while the railway is being used. That being so, the over or under bridge comes under the same legal category as a level crossing. And if a level crossing

was incidental to the use of the railway; and the inconvenience caused by it, then it must be the same with what is a statutory substitution or equivalent for a level crossing. Therefore the inconvenience caused by a rising gradient over a bridge, is an inconvenience of the same character as an inconvenience arising from the gates of a level crossing, and in Lord Cranworth's words, is not a damage to the estate.

[They also commented on Lyon *v.* Fishmongers' Co., 1 App. Cas. 662, Duke of Buccleugh *v.* Metropolitan Board of Works, Law Rep. 5 H. L. 418.]

As to the agreement, it did not enlarge the respondents' rights. It was purely precautionary, to provide against it appearing that any claims which the owner of the property might have should be prevented from being statable.

Sir F. Herschell, S. G., and the Solicitor General for Scotland (Mr. Asher, Q. C.), contended for the respondents, that this case on the main question was undistinguishable from the cases of McCarthy, Law Rep. 7 H. L. 243, and Chamberlain, 2 B. & S. 605, 617. The respondents' claim came more particularly to be determined under the 6th section of the Scotch Railways Clauses Act of 1845, similar to the English Railway Act. The English cases were generally decided upon the terms of the 68th section of the Lands Clauses Act, which deals with "compensation in respect of any lands or of any interest therein which shall have been taken for or injuriously affected by the execution of the works." But though there is no section in the Scotch Lands Clauses Act corresponding to the 68th section of the English Act (8 Vict. c. 18), the decisions under the latter section in England are perfectly applicable in Scotch cases, and in this instance were conclusive in favor of the respondents. To entitle to compensation two propositions must be proved as correct: first, that the acts done could not have been done without statutory authority, and if done without statutory authority would entitle the plaintiff to an action; secondly, if the plaintiff connect the land with the damages, then he is entitled to compensation. The view of what is sufficient connection must be different in regard to different cases. The appellants did not deny that interference with the highway could injuriously affect; but said that the land must be proximately affected. They submitted it was so here. The value of the highway to property is not being able to get out on the few yards in front of your house, for if the highway is obstructed within a short distance of your house the whole way is obstructed. In principle that is an obstruction which, though common to all the lieges, injuriously affects property.

[Lord Selborne, L. C.—In Winterbotham *v.* Lord Derby, Law Rep. 2 Ex. 316, it was held that to maintain an action the plaintiff must suffer some substantial damage peculiar to himself beyond that suffered by the rest of the world.]

That was the case here. The principal decision pressed against them was the Caledonian Ry. Co. *v.* Ogilvy, 2 Macq. 229; but the ground of judgment in that case was that there the alleged injury was only a case of personal inconvenience and not damage to the estate. See Lord Cranworth's opinion, Ibid. at p. 236. Here the injury was consequent on the construction, and was altogether distinct from the use, and therefore altogether distinct from Ogilvy's Case, 2 Macq. 229, where the number of trains bore a ratio to the inconvenience caused. And that case was explained by Erle, C. J., in Chamberlain's Case, 2 B. & S. at p. 638, by Lord Chelmsford in Ricket's Case, Law Rep. 2 H. L. 190, and McCarthy's Case, Law Rep. 7 H. L. at p. 257; and by Willes, J., in Beckett's Case, Law Rep. 3 C. P. 104, and McCarthy's Case, Law Rep. 7 C. P. at p. 513; and by Bovill, J., in Beckett's Case, Law Rep. 3 C. P. at p. 93, as an authority for no more than this, that personal inconvenience as distinguished from diminished value of land will not entitle to compensation. The decisions since the case of Ogilvy supported this distinction.

In Chamberlain's Case, 2 B. & S. 605, which closely resembled this, the public road passing his houses, at a distance of seventy yards from them, was shut up, so as to make it a cul de sac, and a deviated road was provided. The ground of that decision was that although the railway did not touch the ground ex adverso, or in fact, yet that where the access was affected compensation is due.

And in Beckett's Case, Law Rep. 3 C. P. at p. 94, Willes, J., said: "To entitle a claimant to compensation he must have sustained a particular damage from the execution of the works, and the damage must be one for which he might have maintained an action if the work was not authorized by Parliament; and further, the complainant must establish that the injury was an injury to his estate, and not a mere obstruction or inconvenience to him personally, or to his trade, and also that the damage complained of must be one which is sustained in respect of the ownership of the property and not in respect of any particular use to which it may from time to time be put."

In McCarthy's Case, Law Rep. 7 H. L. 243, the dock interfered with—which it is to be noticed was not contiguous to the house, but twenty feet away—was only of use as leading to the highway of the river. So what truly damaged the claimant there was the stopping up of the entrance into the river—which was 400 feet away. The stopping up the end stopped it the whole way. Here it was analogous; the appellants had stopped up the main street at its juncture with the two other streets leading to the respondents' premises.

There was no difference in principle whether the obstruction was ex adverso or not, though that might affect the amount of compensation, but in each case it must be seen whether damage is

proximate or too remote. Their argument was put distinctly by Lord Penzance in McCarthy's Case, Law Rep. 7 H. L. at pp. 263-4: "In each case the right to compensate will accrue, whenever it can be established to the satisfaction of the jury or arbiter that a special value attached to the premises in question, by reason of their proximity to, or relative position with highways obstructed, and that this special value has been permanently destroyed or abridged by the obstruction."

And here the arbiter had found that the damage is a damage having such a connection with the lands as to diminish the value to the extent of £1500. Therefore they submitted that this case was within the principle of all the cases; that the damage is proximate and not remote, and that the decision of the court below in sustaining the arbiter's award was correct.

As to the agreement. Under it the appellants were precluded from disputing the respondents' claim. The language could not be interpreted literally. The intention was to give some benefit, and their view was that fairly construed it imports that compensation would fall to be paid if an injury were proved. The word "barred," meant "taken away," "cut off," or "excluded," and suggests that the right is there, if the bar does not exist. In other words, the view warranted by the language is that the claim is to be disposed of on an assumption (that part of their lands were taken) which is not true in fact, for the purpose of giving legal validity to the claim, provided that damage is proved.

The Lord Advocate, in reply:

While true that the thing must be actionable but for the statutory authority; the converse of that proposition is not true on the cases. It is not the case that everything which but for the statute would be actionable would give rise to a claim for compensation; see opinions of Lord Cranworth, 2 Macq. at p. 235, and Lord Chelmsford, Law Rep. 7 H. L. at p. 256.

[Lord Blackburn.—That was finally settled in Hammersmith Ry. Co., *v.* Brand, Law Rep. 4 H. L. 171.]

The respondents' view of Ogilvy's Case, 2 Macq. 229, was, that it was decided against the complainer, because the things complained of were done in the use of the railway and not in the construction of the works; but that was not the ratio decidendi in fact—that was developed in Brand's Case, Law Rep. 4 H. L. 171.

In Beckett's Case, Law Rep. 3 C. P. 82, the injury affected the complainant's access proper, and in McCarthy's Case, Law Rep. 7 H. L. 243, it was explained that the water highway might in a reasonable sense be called an appendage to the house.

There was a great distinction between a right which a man has of proceeding out straight from his property and getting on to the public ground, and a right which a man has, when he proceeds to go along a public street the same as anybody else.

It is said Chamberlain's Case, 2 B. & S. 605, 617, is a standing authority against the appellants; then in so far as it proceeds on ground which was rejected in Ricket's Case, Law Rep. 2 H. L. 175, the authority of Chamberlain's Case, 2 B. & S. 605, 617, must be destroyed.

[Lord Blackburn.—But in McCarthy's Case, Law Rep. 7 H. L. 243, it was held that Chamberlain's and Ricket's Cases were consistent, and Chamberlain's Case, 2 B. & S. 605, 617, was affirmed.]

That conclusion was arrived at by subtracting the shop element, but Chamberlain's Case, 2 B. & S. 605, 617, had another element in it, his property was sunk down in a hole.

There was a separate point as to the alteration of the gradient, at all events as regards the bridge, for that is incidental to the use and not to the construction.

Certainly, this was a case where the inconvenience suffered is more remote than in any case in which a claim for compensation had been allowed.

Judgment was given as follows:

March 29, Lord Selborne, L. C.—My Lords, the only facts in this case which I think material to the question of principle to be determined are that, before the construction of the appellants' works under the authority given by their Act of 1873, the property of the respondents had a frontage to Canal Street, in Glasgow, and had by that street a direct, straight, and practically level access (at the distance of about ninety yards), for all sorts of traffic, to Eglinton Street, one of the main thoroughfares of that city; and that, by the works of the appellants, that direct access to Eglinton Street has been altogether cut off and taken away, a more distant and circuitous access, crossing the railway by a bridge with a rather steep gradient, being substituted for it. Another direct access to Eglinton Street, from the back of the appellants' premises, has been rendered less convenient, but upon that part of the case I do not think it necessary to dwell.

When the Bill was before Parliament in 1873, the respondents and some other persons, who (like them) had petitioned against it, withdrew their opposition in consideration of an agreement in writing, by which the Caledonian Co. undertook that if and so far as they or any of them might in the judgment of the arbiters or oversman, or jury, to be appointed under the Lands Clauses Consolidation (Scotland) Act of 1845, be injuriously affected by the construction of any of the works proposed to be authorized by the Bill, their claim for compensation should not be barred by reason of the company not taking any part of their respective lands, and that the amount of such compensation, if not agreed upon, should be determined in the manner provided by that Act. When the works were executed, the respondents made a claim for compensa-

tion, and arbiters and an oversman were appointed, under protest, on the company's part. After an ineffectual attempt by the company to stop the arbitration, the oversman finally made an award by which he found the facts, and, on the assumption that the claimants were legally entitled to be compensated by the company for the injury caused to them, assessed the pecuniary amount of the compensation at £1500, allocating £1200 thereof as applicable to compensation for damage by detour, and £300 to compensation for damage by change of gradients. In the view which I take of the case, this division of the difference between the value of the access taken away, and that of the new access substituted for it is not material. If the respondents were entitled to compensation, it was right to award the whole estimated amount of the damage actually sustained by them, and I see no objection in principle to the mode of measuring that damage which the oversman thought fit to adopt. Whether a mere change of gradient would have been itself a subject of compensation, if the direct access to Eglinton Street had in all other respects remained unchanged, is a point on which I do not think it necessary, under the circumstances of this case, to express an opinion.

It was argued for the respondents that the agreement, on the faith of which the opposition to the bill was withdrawn, ought, in the cases of those petitioners (among whom were the respondents) from whom no land was taken by the company, to be deemed an admission, for valuable consideration, of the right to compensation. But with that argument (which seems to have found some degree of favor in the Court below) I cannot agree. All that the company did was to bind themselves not to object on one particular ground, viz., because no land was taken. It was said that an objection on that ground only would have been manifestly untenable in law, and to this I agree. But the parties, nevertheless, seem to have thought that it was worth their while to guard against it; and I think it impossible to infer an implied waiver of all objections from an express waiver of one, whether that was an objection which was obviously untenable or not.

Upon the more important question of the respondents' right to the compensation which the oversman has awarded them, reliance was placed, in the argument at the Bar, on decisions of your Lordships' House. For the appellants it was contended, that compensation was excluded by Caledonian Ry. Co. v. Ogilvy, 2 Macq. 229, and Ricket v. Metropolitan Ry. Co., Law Rep. 2 H. L. 175. The respondents relied on Metropolitan Board of Works v. McCarthy, Law Rep. 7 H. L. 243.

It is your Lordships' duty to maintain, as far as you possibly can, the authority of all former decisions of this House; and although later decisions may have interpreted and limited the application of earlier, they ought not (without some unavoidable

necessity) to be treated as conflicting. The reasons which learned Lords who concurred in a particular decision may have assigned for their opinions, have not the same degree of authority with the decisions themselves. A judgment which is right, and consistent with sound principles, upon the facts and circumstances of the case which the House had to decide, need not be construed as laying down a rule for a substantially different state of facts and circumstances, though some propositions, wider than the case itself required, may appear to have received countenance from those who then advised the House.

With this preface, I think it right to say that all the three decisions of this House, to which I have referred, appear to me to be capable of being explained and justified upon consistent principles; the propositions which I regard as having been established by them, and by another judgment of your Lordships in the case of Hammersmith Ry. Co. *v.* Brand, Law Rep. 4 H. L. 171, being these:

1. When a right of action, which would have existed if the work in respect of which compensation is claimed had not been authorized by Parliament, would have been merely personal, without reference to land or its incidents, compensation is not due under the Acts. 2. When damage arises, not out of the execution, but only out of the subsequent use of the work, then also there is no case for compensation. 3. Loss of trade or custom, by reason of a work not otherwise directly affecting the house or land in or upon which a trade has been carried on, or any right properly incident thereto, is not by itself a proper subject for compensation. 4. The obstruction by the execution of the work, of a man's direct access to his house or land, whether such access be by a public road or by a private way, is a proper subject for compensation. In the case of Caledonian Ry. Co. *v.* Ogilvy, 2 Macq. 229, Lord Cranworth stated the question to be, "Whether a proprietor, who holds land adjoining a newly-constructed railway, can under the clauses of the general Act and the special Acts, which give him a right of compensation in respect of any injurious effect upon his lands, claim from the company compensation, because at a short distance from the entrance to his grounds the railway traverses an important public road on a level;" that road (as his Lordship immediately afterwards proceeded to say), being "the most common" (though not the only), "and the best approach to the pursuer's house." All that your Lordships then decided was, that it was not competent to the sheriff to give any redress in respect of this level crossing.

It is material, in order to understand rightly the reasons assigned for that decision, to bear in mind that, unless the mere fact of rails, etc., being laid across the public road ought to have been held to constitute an actionable obstruction of the pursuer's right to use it

(if there had been no Act of Parliament), that right was not obstructed by the execution of the works of the railway. The pursuer complained of "a constant liability to great inconvenience, interruption, and delay" (by reason of the closing of gates across the public road as often as trains were passing or about to pass); and of danger and alarm to those passing to and from the house, "from the risk of the startling of horses when detained in a narrow road facing the barrier, by the passing and noise of the engines and trains." These were not distinct heads of claim, one for delay, etc., by closing the gates, and another for danger, etc., by the noise of engines and trains; but were only specifications of the manner in which the pursuer proposed to establish his main proposition, that "very material injury" had been "done to the place as a residence, and deterioration caused to the amenity and value of the house and policy, by the railway crossing the approach to the lodge and gate on the level, immediately in front of and within a few yards of the gate, whereby the present free and open communication with the high road at a very short distance was cut off, and all access prevented, without a constant liability to," etc. (ut supra). The communication was not cut off, and access was not prevented, except when trains were passing; the temporary obstruction of the public road by shutting gates across it at those times, as well as the noise complained of, were incidents, not of the construction, but of the use of the line.

The decision, therefore, would have been justified (assuming that the mere placing of rails, etc., across the road would have given no right of action to the pursuer), upon the same grounds on which this house afterwards decided the case of Hammersmith Ry. Co. *v.* Brand, Law Rep. 4 H. L. 171, by which the second of the four propositions which I have stated was established. The peculiar circumstances of the latter case, in which Mr. Brand's real estate suffered physical injury from the vibration of trains, made it necessary for this house to enter into a minute criticism of the language of the compensation clauses in the Acts of Parliament, which, in Mr. Ogilvy's case, was not necessary; because Lord Cranworth and Lord St. Leonards both thought that the injury for which Mr. Ogilvy might have brought his action if the railway had not been authorized by Parliament would have been personal to himself and not an injury to his land, or to any right incident thereto.

But, although the judgment in Ogilvy's Case, 2 Macq. 229, was not expressly rested on the distinction between injuries from the construction, and injuries from the use, of the railway, such a distinction did, nevertheless, exist in the facts, and (as it seems to me) was implied in the reasoning of the noble and learned Lords, especially of Lord Cranworth, 2 Macq. at pp. 235, 238; and in the argument for the appellants, in Brand's Case, Law Rep. 4 H. L.

171, it was so regarded. "The words of the Act" (it was there said) "refer to land taken, or injuriously affected in the making of the railway; and to that matter they were confined by this house, in the case of the Caledonian Ry. Co. *v.* Ogilvy," 2 Macq. 229. The mere act of placing rails, etc., across the road at the level crossing (by itself, and apart from the contemplated use of the railway for the passage of engines and trains) was considered by the house not to affect injuriously the access to Mr. Ogilvy's land. If the prospective liability to the obstruction of the road by the use of the railway for the purposes for which it was made had been, in the judgment of the house, such an injury as would have been actionable had there been no statutory authority, then I should have thought the conclusion ought to have been, that this was an injury, not to Mr. Ogilvy personally, but to his estate, and, therefore, a proper subject for compensation. But the house evidently considered that there would have been no right of action in respect of such a merely prospective liability to obstruction; and the reasoning of the noble and learned Lords was therefore addressed to the legal consequences of obstructions de facto, when they might actually happen by the use of the line. As to these, they thought (and I am not myself satisfied that they were mistaken in thinking, though the decision in Brand's Case, Law Rep. 4 H. L. 171, makes the point now of little or no practical importance) that each particular detention, when Mr. Ogilvy or his servants, being upon the road, might happen to be stopped by the closing of the gates, for passing trains, would (like the nuisance from noise, etc.), be an injury ejusdem generis with that which any other persons using the road might suffer, though accruing to him more frequently than to others; and that any right of action which he might have had for each such detention (if Parliament had not authorized the use of the railway) would have been personal, and not incident to the ownership of his land.

But the point (the only point as it seems to me), which was really determined in that case was, that the mere fact of a railway crossing at a level the access, by a public road, to a landowner's house or estate, with its incidental liability to frequent stoppages by the passage of trains after the line should be used for traffic, would not have been a cause of action if the work had not been authorized, and therefore was not a subject for compensation under the Acts. I suppose that (unless the mere laying of the rails, etc., would have given such a cause of action) this was an unavoidable consequence of the technical interpretation of the words "injuriously affected," as applicable only to something which would have been a legal injuria, in the case of an unauthorized work, an interpretation which it is too late to criticise now; though, if the point were open, I should myself think it questionable whether there was not a fallacy in such a test depending upon the hypothesis of the

same work being executed without authority, which (having regard to the nature and operation of Acts for the execution of that class of public works) can hardly be supposed to have been within the contemplation of Parliament.

In the case of Brand, Law Rep. 4 H. L. 171 (in which I was myself counsel on the unsuccessful side), the question, whether a prospective liability to necessary injury, from the use of the railway for the purpose for which it was made and authorized, was not a subject for compensation properly arising out of the execution of the works, was again raised, and was argued at greater length, and with much greater distinctness, than might be inferred from the report of the argument. The only passage in that report, which seems clearly to point to it, is, Law Rep. 4 H. L. 171, where it is thus put: "This is, in fact, a servitude imposed on the plaintiff's land, and the imposition of that servitude, which is a cause of damage, must be the subject of compensation."

The opinion of Lush, J., in that case, Law Rep. 4 H. L. 184, 188, approved and adopted by Lord Cairns, who dissented from your Lordships' judgment, Law Rep. 4 H. L. 222, 223, was in accordance with that view. But that argument was rejected by the House, Lord Chelmsford (who moved the judgment), saying, Law Rep. 4 H. L. 204: "To argue that, as the injury could not have occurred unless the railway had been previously constructed, therefore it was caused 'by the construction thereof,' is certainly a strong example of the illogical reasoning of 'post hoc, ergo propter hoc,' and would extend to every accident or injury occurring upon the railway after its construction, which, of course, could not have happened if it had not been constructed." I should not myself have thought that the argument did involve that consequence, or that the propter hoc could well be denied; but, however that may be, the argument did not prevail.

I have thought it necessary to say so much as this as to the case of Caledonian Ry. Co. *v.* Ogilvy, 2 Macq. 229, because I am aware, that, to one at least of my noble and learned friends (Lord Blackburn), it appears to present more difficulty than it does to myself. Whether, however, my view of it is correct or not, that case ought not to govern the present; because, here, the respondents' access to and from their property by Canal Street was stopped up and taken away, not from time to time by the use, but once for all by the construction, of the works of the appellants' railway. The respondents' claim is not founded upon a mere liability (whether constant or otherwise) to obstruction, but on obstruction de facto, and that by the works themselves. If, therefore, such an interference with the access to their property by this public street would have been an actionable wrong, if the railway had not been authorized, it is consistent both with Caledonian Ry. Co. *v.* Ogilvy, 2 Macq. 229, and with Hammersmith Ry. Co. *v.* Brand, Law Rep.

4 H. L. 171, to hold them entitled to compensation under the Acts.

It is however contended, on the authority of Ricket's Case, Law Rep. 2 H. L. 175, that although the respondents' access to Eglinton Street by Canal Street was entirely taken away, that access was not a right so connected with or incident to their real estate fronting on Canal Street as to entitle them to compensation for its loss. It was in Ricket's Case, Law Rep. 2 H. L. 175, that the third of the four propositions, to which I have referred, was established by this house.

There is, at first sight, some apparent similitude between the circumstances of Ricket's Case, Law Rep. 2 H. L. 175, and those of the present; but it disappears when the facts of that case and the exact nature of the claim made in it are rightly understood. The facts of Ricket's Case, Law Rep. 2 H. L. 175, as they appear in the appeal papers (to which I have referred) are these: The "Pickled Egg," a public-house with a skittle-ground attached to it, of which Mr. Ricket was lessee and occupier, stood on one side of a street or carriage-way in the metropolis called Crawford Street. On the other side of the same street was Clerkenwell Workhouse, a considerable block of buildings, and on the further side of the workhouse another street or carriage-way called Coppice Row, running in a direction which may, for the present purpose be described as parallel to Crawford Street, of which the line was irregular, and communicating with certain other streets, called Victoria Street and Bowling Green Lane. Between Crawford Street and Coppice Row there was a covered public footway, 76 feet long and 5 feet wide, running out of Crawford Street at a point just opposite to the "Pickled Egg." For twenty months, during the construction of the Metropolitan Ry., hoardings were set up by the company by which the carriage roadway of Coppice Row and Bowling Green Lane were obstructed, the foot pavements on both sides of each of those streets remaining without obstruction. The footway leading from Crawford Street to Coppice Row, and its communication with the foot pavement on that side of Coppice Row, were not interfered with; and the company constructed a bridge for foot passengers over the obstructed part of the roadway in Coppice Row, so that foot passengers coming from Crawford Street to Coppice Row or Bowling Green Lane, or vice versa, might pass by the covered footway, over this bridge, to the foot pavement on either side of Coppice Row, and so to Bowling Green Lane and the other streets leading out of Coppice Row, or thence to Crawford Street. There was, therefore, no obstruction at all which could interfere with the direct access to or from the "Pickled Egg" by way of Coppice Row and the streets beyond it, for foot passengers; the previous and the only direct access from thence to Coppice Row having been by the covered footway. No claim for compensation

was made on the ground of any actual or supposed interest of the plaintiff Ricket in any of the carriage roadways which were obstructed, or on any other grounds, except the loss of custom to his trade as a publican. He did, indeed, allege in his claim "that his public-house had been injuriously affected," but loss of custom was the only ground stated for that allegation.

The question came before the courts in the form of a special case, in which the effect of the plaintiff's evidence was stated to be "that foot passengers came to his house from Hoxton, Islington, the City Road, Goswell Street, and a variety of places north and east of Coppice Row, from Bowling Green Lane across Coppice Row, and down the covered footway or passage, and persons passed and repassed towards and from Holborn and the places beyond; and that there was no nearer way from Hoxton to the 'Pickled Egg,' and that the principal part of the trade of the public-house was derived from customers attracted to it by a skittle-yard attached thereto, and coming through the said thoroughfare from Bowling Green Lane and passing his house; that immediately after the obstruction the number of foot passengers coming towards the said public-house in manner aforesaid was greatly diminished, and the custom to and trade of the public house greatly fell off, and did not again improve while the hoarding continued, or after it had been removed; the traffic of the neighborhood having been entirely altered by the works." The special case stated the question for the opinion of the Court to be "whether the loss of customers by the said Henry Ricket in his said trade, under the above circumstances, was such damage as entitled him to recover compensation from the company? If the Court should be of that opinion, judgment to stand for £100. But if the Court should be of opinion that he was not so entitled," then judgment to be for defendants.

The opinion of the Court of Queen's Bench entered on the record as the foundation of their judgment for the plaintiff, was that "the loss of customers in the plaintiff's trade," under the circumstances stated, "was such as entitled him to recover compensation from the company." That judgment was reversed in the Exchequer Chamber, from which the plaintiff Ricket appealed to your Lordship's House. The ground of the reversal in the Exchequer Chamber was stated by Lord Chief Justice Erle in the following words: "Even if the action would lie for this obstruction, whereby the plaintiff was damaged in his trade, still such damage did not accrue to the plaintiff in his capacity of owner of an estate in land The trading carried on in the house is entirely distinct from the estate in the house." And that learned judge distinguished the case from Chamberlain *v.* West End of London Ry. Co., 2 B. & S. 617, in the decision of which against the railway company he had himself concurred. "It is certain," he said, "that the houses themselves of the then plaintiff were found

to be injuriously affected, and for that injury alone the compensation was awarded. The principle is, that the value of a house is affected by the relation of its situation to the adjoining highway, that is, by the convenience of the private rights of ingress and egress from the one to another, and by the circumstance of the highway itself tending to make it useful and agreeable to the occupier of the house." 5 B. & S. at p. 165.

When Ricket's Case, Law Rep. 2 H. L. 175, came to your Lordships' House the judgment of the Exchequer Chamber was affirmed. Lord Chelmsford and Lord Cranworth concurring in the result, though not in all their reasons. Lord Westbury dissented, calling in question the rule that the words "injuriously affected," in the compensation clauses of the Lands and Railways Clauses Acts, mean only such a technical injuria as would have been actionable if the work had not been authorized by the Legislature. Much of Lord Chelmsford's reasoning was founded upon a distinction between temporary and permanent damage under the 68th section of the Lands Clauses Act, and the 6th and 16th sections of the Railways Clauses Act, in which Lord Cranworth did not concur; and it certainly does not appear to me that the decision of Ricket's Case, Law Rep. 2 H. L. 175, either in this House or in the Exchequer Chamber, can satisfactorily be explained by any such distinction. But both the noble and learned Lords agreed that the damage by loss of custom, of which the plaintiff complained, was a consequence of the works of the railway company, too remote and indefinite to bring it within the scope of any of the compensation clauses of the Acts; and this I consider to have been the true ground of that decision and also of an earlier decision of the Court of Queen's Bench in the case of Rex *v.* London Dock Co., 5 Ad. & E. 163, in which a claim to compensation was made under a special Act, passed before the Consolidation Acts, on similar grounds, and which (in Ricket's Case, Law. Rep. 2 H. L. 175), was referred to with approval by the Lord Chief Justice in the Exchequer Chamber, Erle, C. J., 5 B. & S. 168, and by both the learned Lords, whose view was adopted by this House, Lord Chelmsford and Lord Cranworth.

I may add that the same view of Ricket's Case, Law Rep. 2 H. L. 175, was afterwards taken by Willes and Byles, JJ., in the case of Beckett, Law Rep. 3 C. P. 82, where the former of those learned judges spoke of it as deciding that an injury for which compensation is due "must be in respect of the property itself, and not of any particular use to which it may from time to time be put;" and the latter, as proceeding on the ground that the injury was not temporary but "indirect, and to the trade only."

In the present case, as in Chamberlain *v.* West End of London Ry. Co., 2 B. & S. 617, and Beckett's Case, Law Rep. 3 C. P. 82, (both which were approved and followed by this House in Metro-

politan Board of Works v. McCarthy, Law Rep. 7 H. L. 243), the claim was made in respect of a direct and immediate injury to the respondents' estate by cutting off their direct and immediate access to Eglinton Street. The circumstances of Chamberlain's Case, 2 B. & S. 617, closely resembled those of the present case. In Beckett's Case, Law Rep. 3 C. P. 82, the width of the public road immediately opposite the plaintiff's premises was reduced, so as to render it, not useless to those premises for the purpose of access, but less convenient than before. In McCarthy's Case, Law Rep. 7 H. L. 243, this House gave compensation for the obstruction of access to the River Thames from the plaintiff's premises through a public dock lying on the other side of a public road adjoining those premises.

It was argued for the appellants that these authorities ought not to be extended to any case of the obstruction of access to private property by a public road, when such obstruction is not immediately ex adverso of the property. This limitation, however, seems to me arbitrary and unreasonable, and not warranted by the facts either of Chamberlain's, 2 B. & S. 617, or of McCarthy's Case, Law Rep. 7 H. L. 243. A right of access by a public road to particular property must, no doubt, be proximate, and not remote or indefinite, in order to entitle the owner of that property to compensation for the loss of it; and I apprehend it to be clear that it could not be extended in a case like the present to all the streets in Glasgow through which the respondents might from time to time have occasion to pass for purposes connected with any business which they might carry on upon the property in question. But it is sufficient for the purposes of the present appeal to decide that the respondents' right of access from their premises to Eglinton Street, at a distance of no more than ninety yards, was direct and proximate, and not indirect or remote. The Court of Session has so decided, and I think your Lordships cannot, consistently with your decision in McCarthy's Case, Law Rep. 7 H. L. 243, do otherwise than affirm their judgment. I therefore so move your Lordships.

Lord O'Hagan.—My lords, two questions have arisen in this case. The first, as to the true construction and effect of the letter of the 4th of July, 1873, on the faith of which opposition to the Bill introduced by the railway company was withdrawn, may, I think, be briefly disposed of. It was contended that by that letter the company bound themselves to submit to the arbitrators or the oversman the claims of the petitioners, whatever they might be, which they might think fit to put forward on the allegation that their property had been "injuriously affected" by the making of the railway. I have no doubt that the true meaning of this undertaking was that attached to it by the Lord Ordinary. It could

scarcely have been in the contemplation of the parties to have made any demand, however wild, unreasonable, or illegal, the subject of inquiry before arbitrators or a jury. Of course the company might have bound themselves by clear words, for the avoidance of risk or expense, to forego the right of objection even to any such demand; but the words should be very clear to warrant us in attributing to them so improbable a purpose, and should not be strained to justify the imputation of it. The letter seems to me to give no such warrant. It merely provides, in terms, that although no part of the lands of the claimants and petitioners should be taken by the company, they should have all the rights they could have legally enjoyed if it had been otherwise. Larger rights than those given within the operation of the Railway Acts were not conceded to them, and whether, as has been mooted, the undertaking so regarded was of any or of no effect in affording a consideration for the withdrawal of the opposition, it seems to me to have entitled the claimants to nothing more. If, within the scope and operation of the statutes, they could establish a claim, it was not to be barred because land was not taken from them; but that claim was not to be extended beyond the limit to which it would have statutably reached if it had been connected with the taking of land.

On the second subject of dispute the cases are not perhaps quite easy of reconcilement, but I think they may be reconciled notwithstanding, and in my opinion the question is settled by the authority of this House. I need not refer in any detail to the circumstances under which the controversy arises; but the oversman or umpire to whom the parties referred their dispute has ascertained facts which must be taken as established, and upon which we must determine whether the claim to compensation, on the ground that the respondents' property has been "injuriously affected" within the meaning of the statutes by the works of the company, has been sustained.

The decreet arbitral conclusively determines that the respondents have suffered and suffered largely from the construction of the railway. It has not taken any of their property, and the injury done to them has not been caused by erections upon any land of theirs or in immediate propinquity with or ex adverso to such land; but it has done them damage by deteriorating the mode of access to it, by obliging them to make a detour of about 265 feet, and by altering the gradients of a street to 1 in 20 for a space of about 116 feet, and 1 in 34.7 for a space of 197 feet. The oversman has found that in these circumstances the claimants' property is, in his opinion, "injuriously affected," and he assesses the damages at the sum of £1500.

On this finding we are warranted in assuming, for the purpose of the argument, that there has been substantial injury, and such an injury as before the enactment of the Railway Statutes would

have given the respondents a clear cause of action; that that injury has been done to their estate so as not merely to produce personal or general inconvenience, but by a material operation to diminish the value of it; and that whilst the difficulties of detour and change of gradients may have been unpleasant and mischievous to the public in the neighborhood of the works, they were specially and particularly injurious to the respondents, so as, in the result, to impose on them a large pecuniary loss.

Taking the facts so found, this case seems to me wholly undistinguishable from that of Metropolitan Board of Works *v.* McCarthy, Law Rep. 7 H. L. 243. I was a party to the judgment in that case, and my reported opinion states, perhaps at more than sufficient length, the grounds on which I thought it sustainable, and I shall not make an idle repetition of the statement of those grounds. I see no reason to alter in any respect the view which I then adopted or the reasons which I urged in support of it; and if it be correct, the respondents are clearly entitled to succeed. In that case, as in this, there was a public way, and in that, as in this, access to it was obstructed by the works complained of. There, as here, the obstruction produced inconvenience to the general public who had the use of the way, but there, as here, there was in addition a particular and appreciable damage to the premises of an individual, rendering them less available for his purposes, and, therefore, diminishing their value. In the language of an old case, he "did necessarily suffer an especial damage more than the rest of the King's subjects;" Iveson *v.* Moore, 1 Salk. 15. There, as here, the works which founded the complaint did not infringe upon the premises which they injured; and the makers of them were not held answerable because of any close propinquity or any ex adverso position. Such circumstances were not there held necessary to ground the judgment, as we were pressed to hold them to be here. There the premises were pronounced to have been "injuriously affected," and the proprietor to have suffered damage to his estate, although no land was taken from him, and although no land of his was touched; the physical obstruction of access being deemed in itself an injury to the premises which it damnified, within the meaning of the compensation clauses.

I can recognize no distinction in substance between that case and this, and if there be none, we are bound to follow it. For my own part, I fully concurred in the decision, and I repeat it cheerfully, for I have never been able to understand the reason why premises should not be held to be "injuriously affected" if they are injured under such circumstances by the construction of a railway so as to be diminished in usefulness and lowered in value, or why, if there be real and appreciable injury, there should not be adequate compensation. The words of the Acts are large enough to accomplish justice as between the company and the claimant, and whilst on

the one side the selfishness of private persons should not be permitted to forbid the progress of needful improvements, on the other individuals should not be made to suffer remediless wrong from an overstrained apprehension of the prevention of useful works by the admission of unreasonable claims for compensation. It is desirable that there should not be excess of favor either for the individual interest as antagonizing a general benefit or for the promotion of public improvements at the cost of personal injustice.

The rule of action was well stated by Lord Penzance in the case to which I have been referring; he said: "The right to compensation will accrue whenever it can be established to the satisfaction of the jury or arbitrator that a special value attached to the premises in question, by reason of their proximity to, or relative position with, the highways obstructed, and that this special value has been permanently abridged or destroyed by the obstruction."

As I have felt it improper to repeat the reasons which led me to concur with the judgment of the House in the case of the Metropolitan Board of Works *v.* McCarthy, Law Rep. 7 H. L. 243, so the full discussion which the Lord Chancellor has applied to the other cases cited in the course of the argument, dispenses me from the necessity of dwelling on any of them. I shall only say that some of those cases appear to me equally and wholly undistinguishable from McCarthy's Case, Law Rep. 7 H. L. 243, and from that with which we are dealing. I do not know that any intelligible distinction has even been suggested as to Beckett's Case, Law Rep. 3 C. P. 82, and Chamberlain's Case, 2 B. & S. 617. In the former the narrowing of a highway which permanently damaged the premises of the claimant by obstructing the access to his house, was held to entitle him to compensation; and in the latter, the stopping up of a high-road near the complainant's houses, preventing the thoroughfare past them, which theretofore existed, and so producing to him in the words of the Chief Justice, "a particular damnification," sustained his claim. All the elements of the right to damages which those cases present, occur in this, and they have been repeatedly approved in this House.

As to the authorities which have been pressed as countervailing or minimizing the force of the decision in McCarthy's Case, Law Rep. 7 H. L. 243—viz., Ricket's Case, Law Rep. 2 H. L. 175, and Ogilvy's Case, 2 Macq. 229, they seem to me sufficiently distinguished by their diverse circumstances, and the ratio decidendi of the Judges in each of them. In the first, the loss of customers was the gist of the subject matter of complaint, and it was determined that though the claimant might have been personally injured in that way, he had not suffered from any damage to his house or estate such as would entitle him to compensation. In the second, the crossing on the level, and its consequences by inconvenience, delay, and otherwise, were held not to constitute an injury to the

house or land of the complainant; but to be personal to himself, and not to constitute a ground for damages within the provisions of the statutes. Lord Cranworth declared that all attempts at arguing that there was a damage to "the estate," made "a mere play upon words." "It is no damage at all," he said, "to the estate, except that the owner of that estate would oftener have a right of action from time to time than any other person, inasmuch as he would traverse the spot oftener than other people would traverse it." And Lord St. Leonards spoke to the same effect, and with equal clearness; he said: "I can see nothing by which this gentleman would sustain damage beyond what everybody else sustained. His estate is not injured."

These passages, and the general tenor of the judgment, seem to me to have fully justified Lord Chief Justice Erle in Chamberlain's Case, 2 B. & S. 617, in affirming, in the Exchequer Chamber, that "the principle of that judgment, in Ogilvy's Case, 2 Macq. 229. was that the respondent was claiming compensation for personal inconvenience or annoyance, and not for injury to his property." 2 B. & S. 617. Besides, in that case, the injury might have been held to arise from the user rather than the construction of the railway within the principle afterwards established in Brand's Case, Law Rep. 4 H. L. 171, and there was further room for contention, as was expressly noted by Lord St. Leonards, that Mr. Ogilvy had not suffered such special and particular damage as would give him a claim unshared by all the travellers of the neighborhood, and "the rest of the king's subjects."

As I said in McCarthy's Case, Law Rep. 7 H. L. 243, I should have been disposed, if the matter had been res integra, to doubt whether the statutes were designed to make the possibility of bringing an action, if they had not been passed, essential to ground a claim for compensation; and I should also have doubted whether the injury done to Mr. Ogilvy's house, by diminishing its comfort and convenience and so deteriorating it, was not an injury to his estate in it, warranting a demand against the company. But assuming that the general construction now irrevocably put upon the words "injuriously affecting," and the decision in that particular case, were as correct as they are binding upon us, it seems to me that at least their effect need not be pushed further than is unavoidable, and that the points of distinction to which I have adverted relieve us from any necessity of regarding Ogilvy's Case, 2 Macq. 229, or Ricket's Case, Law Rep. 2 H. L. 175, as inconsistent with McCarthy's Case, Law Rep. 7 H. L. 243, with which that before us appears to me unquestionably identical.

On these grounds I entirely concur with the Lord Chancellor, and I advise your Lordships to affirm the ruling of the Court of Session, and to dismiss the appeal.

LORD BLACKBURN.—My Lords, the respondents as pursuers below, sought to enforce payment of £1500 awarded to them by the decreet arbitral of the oversman, to whom had been referred a claim for compensation for their lands, situated in the suburbs of Glasgow, on the south side of the Clyde, having been injuriously affected by the exercise of the powers conferred on the then respondents, now appellants, by a special Act which incorporated the Lands Clauses Consolidation (Scotland) Act, 1845, 8 Vict. c. 19, and the Railway Clauses Consolidation (Scotland) Act, 8 and 9 Vict. c. 33.

The findings in the decreet arbitral of the oversman, slightly abridged, are as follows: "I do hereby find (1st) That the claimants' property consists of a plot of ground bounded by Francis Street, sixty feet wide, on the east; by Canal Street, sixty feet wide, on the north; by Victoria Street, sixty feet wide, on the south, and by an unformed street, intended to be sixty feet wide, on the west; that the said three first-mentioned streets were in the year 1873, and continue to be, public streets. (2d) That part of the claimants' property was used as a factory, and the rest as dwelling houses, etc., both let at rents. (3d) That the claimants have sustained no loss or damage in respect of diminution or reduction of rents since the time the respondents' operations began. (4th) That during the respondents' operations, and since their completion, the claimants' property has not by reason of these operations sustained any physical injury in its structure as buildings, or in respect of drainage, light or air. (5th) That prior to the respondents' operations the claimants had direct, straight, and practically level access, to and from their property from and to Eglinton Street on the east (1st) by Canal Street, and (2d) by Victoria Street; Eglinton Street then forming (as it does still) a leading thoroughfare from the centre of Glasgow to the south. (6th) That since the respondents' works were executed, and by reason of their execution, the following results have happened: (1st) Canal Street has been shut up as a direct access to Eglinton Street, and in place of that direct access the respondents have formed as a substitute therefor Salkeld Street, a public but a back street of fifty feet wide, running nearly parallel to, and to the west of, Eglinton Street. (2d) Salkeld Street is not direct or straight, but slightly curved in its formation, and is steeper in its gradients than Eglinton Street, for the corresponding distance between Canal Street and Cork Street, the steepest gradient being 1 in 34 as compared with Eglinton Street, the steepest gradient in which within the same distance being 1 in 59. (3d) For the purposes of traffic carried or going to or from the claimants' property to Glasgow or the north, the detour caused by this substituted street is immaterial, but, taking the west end of Cumberland Street (Cumberland Street lies on the east side of Eglinton Street) as a common point by

Eglinton Street, and by Salkeld Street from Canal Street, the detour or extra distance caused by the respondents' works extends to about 1485 feet, and now applies to all traffic from the claimants' property carried or going eastward along Cumberland Street. (4th) That Victoria Street has not been shut up, but has been slightly diverted, with no appreciable detour, as an access to the claimants' property to or from Eglinton Street and the south, but with a detour or extra distance caused by the respondents' works of about 265 feet which now applies to all traffic carried or going by Eglinton Street to the north, and the diversion of Victoria Street, and the building of a bridge over their railway by the respondents, have had the effect of altering the gradient of a street formerly almost level to 1 in 20 for a space of about 116 feet, and 1 in 34.7 for a space of about 197 feet. (7th) That the new substituted access by Salkeld Street forms, in conjunction with Canal Street, Cork Street, and Victoria Street, the principal access to Eglinton Street for the claimants' property and the other properties situated in the same locality, including the Joint Line Railway station and the Canal Basin. (8th) That, in these circumstances, and having regard to the facts and circumstances proved, the claimants' property is, in my opinion, injuriously affected by the construction of the respondents' works, and, on the assumption that the claimants are legally entitled to be compensated by the respondents for the injury so caused, I fix and assess the pecuniary amount of this compensation at the sum of £1500 sterling, whereof I allocate the sum of £1200 as applicable to compensation for damage by detour, and the sum of £300 to compensation for damage by change of gradients."

It is not disputed that the oversman had before him evidence to justify his findings of fact, and that being so, we must, I apprehend, accept his findings as true, and that the pursuers have, in fact, sustained substantial and appreciable loss from the works of the appellants, not touching their land, but altering the mode of access to it by public ways, so as to compel those occupying their lands when going in certain directions, not in all, to use a longer road than before, or, as it is phrased, to make a detour, and also when going in certain directions, not in all, to use a road less commodious because steeper than before, or, as it is phrased, by change of gradients; and the question of law arises whether the pursuers are entitled to compensation for those two heads of damage.

Some things, I think, are now no longer open to discussion. No action can be maintained for anything which is done under the authority of the Legislature, though the Act is one which if unauthorized by the Legislature, would be injurious and actionable. The remedy of the party who suffers the loss is confined to recovering such compensation as the Legislature has thought fit to give him (see Hammersmith Ry. Co. *v.* Brand, Law Rep. 4 H. L. 171).

The Lands and Railway Clauses Acts of 1845 give some compensation. I do not think that there is in this respect any difference between the legislation for England and for Scotland. And it must now be considered settled that on the construction of these Acts, compensation is confined to damage arising from that which would, if done without authority from the Legislature, have given rise to a cause of action.

Lord Westbury strongly held and expressed an opinion that this was too narrow a construction of the statutes; but the Duke of Buccleuch *v.* Metropolitan Board of Works (Law Rep. 5 H. L., at p. 461) he admitted that what he thought the wrong construction was put upon the statutes by this House. And it must, I think, also be now considered as settled that the construction of those statutes is confined to giving compensation for an injury to land or an interest in land; that it is not enough to show that an action would have lain for what was done if unauthorized, but it must also be shown that it would have lain in respect of an injury to the land or an interest in land.

The pursuers in the present case rested their claim on two grounds:—Firstly, that compensation was given by the statutes for such damage as the overman had found to exist in fact. The Court of Session have based their judgment in their favor on this ground, and I have come to the conclusion that they were right. Secondly, that there was a special agreement between the pursuers and the respondents below, under which the pursuers were entitled to compensation, even if the construction of the statutes was adverse to them. The Court of Session did not decide this, but intimated an inclination of opinion favorable to the pursuers. This question is not likely ever again to arise; but my impression is against the pursuers on this ground. I do not, however, think it necessary finally to form an opinion on this. I shall confine my remarks exclusively to the first question, which depends upon the true construction of the statutes of 1845.

There have been many decisions on those statutes. I shall think it proper to refer to five in this House, which it is certainly not easy, and to my mind it is not possible, altogether to reconcile. I shall not examine the decisions in the courts below, except where it is necessary in order to understand those in this House. The first in point of date is Caledonian Ry. Co. *v.* Ogilvy (2 Macq. 229), decided in this House in 1856. It was on this decision that the appellants' counsel principally relied. In Caledonian Ry. Co. *v.* Ogilvy (2 Macq. 229) the claim of the respondent, pursuer below, for compensation had been tried before the sheriff. The jury had, under the direction of the sheriff, given a verdict assessing compensation, amongst other things "for £560 in respect of severance and level crossing," but without distinguishing how much had been assessed for the severance, and how much for the level crossing.

The Court of Session had given judgment for the landowner. This judgment was reversed.

The Lord Chancellor (Cranworth) expresses great embarrassment as to the mode in which the question was raised, but concludes that there was nothing to prevent the House "from deciding, first, that the sheriff first and the Court of Session afterwards have fallen into an error in supposing that this level crossing was a subject for compensation at all; that it is a damnum sine injuria; that so the sheriff ought to have told the jury; that the verdict on the face of it is bad, is a verdict which cannot stand, but which ought to be overturned; and that the interlocutor of the Court of Session ought to be reversed."

Since the decision of this case, it has, after a great diversity of judicial opinion, been finally decided in Hammersmith Ry. Co. *v.* Brand (Law. Rep. 4 H. L. 171) by a majority of this House (Lord Cairns dissenting), that the legislation of 1845 did not give a right to compensation for any damage to lands arising from the authorized use of locomotives on the railway, though it took away the owner's right of action for such damage. And, as I think, it cannot be denied that much the greater part of the damage occasioned by a level crossing, certainly the greater part of what was claimed in Caledonian Ry. Co. *v.* Ogilvy (2 Macq. 229), arises only from the use of the railway. If no trains ran on a line there would still be the inconvenience that carriages would cross rails laid over the road. It might well have been said that the damage occasioned by that was inappreciable; or at all events that the sheriff should have directed the jury to assess no more compensation than was due to this, excluding that on which the pursuer mainly relied, viz., the danger and annoyance to nervous persons from the passing trains.

But though there are some expressions in the opinions both of the Lord Chancellor (Cranworth) and of Lord St. Leonards that seem to show that an idea somewhat akin to this was in their minds, I do not think either makes it the ground of his judgment. And it was not till 1869, thirteen years after Caledonian Ry. Co. *v.* Ogilvy (2 Macq. 229) was decided, that it was decided in Hammersmith Ry. Co. *v.* Brand (Law Rep. 4 H. L. 171) that, on the true construction of the Acts, no compensation was given in such a case, and I cannot find that it was suggested by any one in the discussion of that case that Caledonian Ry. Co. *v.* Ogilvy (2 Macq. 229) was an authority in favor of the view which ultimately prevailed.

I think the ground on which both the Lord Chancellor (Cranworth) and Lord St. Leonards decided in Caledonian Ry. Co. *v.* Ogilvy (2 Macq., 229) was that no compensation is given for damage occasioned by the works of the company, if the thing done was one for which, if done without any statutable powers, no action

could have been maintained, however certain it may seem that it would never have been done but for the creation of the company, which, notwithstanding Lord Westbury's strong opposition, is, I think, now settled to be correct law. Next, that though an action would have lain for the thing done, yet no compensation is given, unless the ground of action would be that lands, or some interest in lands, was injuriously affected, which also is, I think, now settled law, and they thought that the pursuer could not have maintained an action at all, or, if he could, that it would have been an action in respect of personal loss or inconvenience, and not an action in respect of an injurious affection of his land or house.

Lord Cranworth, in Ricket *v.* Metropolitan Ry. Co. (Law Rep. 2 H. L. 175, at p. 198) in 1867, repeated more deliberately in what was evidently a written opinion what he had verbally said in Caledonian Ry. Co. *v.* Ogilvy (2 Macq. 229) in 1856. He there says, "Both principle and authority seem to me to show that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundations of buildings on it, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in contemplation of the Legislature."

It was not, and I think could not successfully have been, disputed at the Bar that if this passage is a correct statement of the law, the decision now appealed against could not be supported. And if there had been no subsequent decisions on this point, I should have felt very great difficulty in refusing to follow what I think was the decision of this House in Caledonian Ry. Co. *v.* Ogilvy (2 Macq. 229), even if convinced it was a mistake. But there have been many decisions since 1856, four of them being decisions of this House. There had been, after Caledonian Ry. Co. *v.* Ogilvy (2 Macq. 229), a decision of the English Court of Exchequer Chamber in Chamberlain *v.* West End of London Ry. Co. (2 B. & S. 617), which it is not easy to reconcile with what I think was the view of the law taken in Caledonian Ry. Co. *v.* Ogilvy (2 Macq. 229). The next case in this House was Ricket *v.* Metropolitan Ry. Co. (Law Rep. 2 H. L. 175), in 1867. The Lord Chancellor (Chelmsford) agreed in the result with Lord Cranworth, but gave a long judgment which, as he afterwards explained it in Metropolitan Board of Works *v.* McCarthy (Law Rep. 7 H. L. 243), however much it may have been misunderstood, was not intended to express an agreement in the passage I have just read, saying (page 259) that in Ricket's Case (Law Rep. 2 H. L. 175) there was no finding

which related to the premises, but merely of personal damage; and Lord Westbury dissented from that judgment altogether. The House in coming to this decision, can hardly perhaps be said to depart from what I understand to have been the view of the law taken in Caledonian Ry. Co v. Ogilvy (2 Macq. 229), but it gives it no additional authority.

The next case which came before this House was that of Duke of Buccleuch v. Metropolitan Board of Works (Law Rep. 5 H. L. 418) in 1872. The question in that case was so complicated with others, that I have great doubts whether it can properly be said that this House decided anything on the point now before us, though Lord Cairns in his opinion distinctly enough showed what his view of the law was.

And then, in 1874, came the case of Metropolitan Board of Works v. McCarthy (Law Rep. 7 H. L. 243), on which the respondents both below and at your Lordships' Bar principally relied. In that case the Lord Chancellor (Cairns) said (at page 252), "Now, my Lords, divesting the present case of the more precise description which I have read from the case, it appears to me to amount to this. The occupier or tenant of a house has got in front of his house two highways, the one highway being a road or street, and the other immediately beyond or abutting upon the road or street being a highway by water. The highway by water is taken away from him, the highway by land remains. It appears to me that it is impossible to doubt that the destruction of the highway by water, situate as I have described it, is otherwise than a permanent injury to the property in question, by whomsoever or for whatsoever purpose that property may be occupied. The case appears to me to be extremely analogous to a case decided by the Court of Common Pleas before the present case, the case of Beckett v. Midland Ry. Co. (Law Rep. 3 C. P. 82), in which there was in front of the premises in question in that case one single highway, the farther half or the farther third portion of which was taken off and blocked up by the execution of the defendant company's works. It was there held that that was an injury which permanently and injuriously affected the premises in question, and it appears to me to be a matter entirely indifferent whether you have one highway, the farther half of which is blocked up and destroyed, or whether you have a double highway, first by land and then by water, and part of the highway which consists of water is blocked up and destroyed. My Lords, in his very able argument at your Lordships' Bar, Mr. Thesiger stated what he would rely upon as a definition of the right to compensation; and having considered this case very fully, I myself should not be disposed to find fault with any part of that definition, although definitions are always matters of very considerable difficulty. Mr. Thesiger stated that the test which he would submit as

one which he thought would explain and reconcile the various cases upon this subject was this, that where by the construction of works there is a physical interference with any right, public or private, which the owners or occupiers of property are by law entitled to make use of in connection with such property, and which right gives an additional market value to such property, apart from the uses to which any particular owner or occupier might put it, there is a title to compensation if, by reason of such interference, the property as a property is lessened in value."

I have read this part of the judgment at length, from which I think it sufficiently appears that the judgment did not proceed on the ground that the obstruction to the water highway was opposite to the plaintiff's premises, but this appears more clearly by a reference to the case at large, which shows that the damage was all occasioned by making the embankment across the mouth of the drawdock, more than 400 feet from the plaintiff's premises, and so cutting him off from the Thames. Probably when that was done, the rest of the drawdock now rendered useless was filled up, though that is not stated in the case, but whether it was filled up or not, the damage to McCarthy's premises would be the same.

Lord Chelmsford, as I have already said, explained his judgment in Ricket *v.* Metropolitan Ry. Co., Law Rep. 2 H. L. 175, as proceeding on the ground that the damage there claimed was merely a personal damage, and that he meant to affirm the decision in Chamberlain *v.* West of London Ry. Co., 2 B. and S. 617. At the same time he certainly treats Caledonian Ry. Co. *v.* Ogilvy, 2 Macq. 229, as rightly decided.

In do not think it necessary to read any part of the opinions of Lords Hatherley, Penzance, and O'Hagan, who all agreed in the result. I think this decides that the right of access by a public way to land is a right attached to the land, and that if an obstruction to the public right of way occasions particular damage to the owner or occupier of that land by diminishing its value, the action which he might bring for that particular damage would be an action for an injury in respect of the land; and that is in direct conflict with what I understood to have been the ground of the decision in Caledonian Ry. Co. *v.* Ogilvy, 2 Macq. 229. It certainly seems to me that if it be conceded that the oversman had before him materials on which he could legitimately find the facts which he has found, the present case is undistinguishable from that of Metropolitan Board of Works *v.* McCarthy, Law Rep. 7 H. L. 243.

Now I do not dispute that an obstruction to a highway may be so distant from lands, that no one could reasonably find that the lands were appreciably damaged by the obstruction, but I think it unnecessary to try to give a definition of that distance. It is enough to say that in this case the distance is not too great.

I have only further to notice the decision of this House in Lyon *v.* Fishmongers' Co., 1 App. Cas. 662. The question there was on a different statute, but I think the decisiom much in point. By the Thames Conservancy Act (20 and 21 Vict. c. 147), s. 53, powers were conferred upon the Conservators of the Thames to license any owner or occupier of land to make any work immediately in front of his land, and into the body of the river. No compensation was given by that Act, but sec. 179 provided that nothing in the Act should extend to take away or abridge any right to which any owner or occupier of land upon the banks of the river is now by law entitled.

The question raised was whether the right which Lyon, as owner of a wharf, had of access to the river on the side of his wharf, as well as in front of it, was a right saved by this 179th section, so as to entitle him to an injunction against an obstruction to it authorized by a license granted under sec. 53. The Court of Appeal had decided that it was not.

Lord Justice Mellish in delivering the judgment says (Law Rep. 10 Ch. Ap., at p. 688) that it was agreed and could not be disputed that if such an embankment as that proposed were made without the authority of Parliament, the plaintiff would have a remedy by action at law, or by suit in equity, but the difference was as to what would be the ground of the action or the suit. It is singular that though Caledonian Ry. Co. *v.* Ogilvy, 2 Macq. 229, and Metropolitan Board of Works *v.* McCarthy, Law Rep. 7 H. L. 243, had, it appears, been cited and relied on by the counsel for the plaintiffs, Lord Justice Mellish does not seem to have appreciated their importance as bearing on this question; at least he takes no notice of these cases. He proceeds to say (Law Rep. 10 Ch., at p. 390): "A man having a mere right of way, the narrowest possible, down to the water edge, has as much right as the owner of the most extensive riparian property to the reasonable use of any portion of the navigable river for the purpose of loading or unloading goods or embarking or disembarking passengers; and if a public way went down to the water edge, any one of the public using that would have the same right of using the stream. The right to stop a carriage or wagon on the highway for the purpose of loading or unloading is not limited to, and has no necessary connection with, frontage, e.g., the occupier of a back workshop has exactly the same rights as the shopkeeper in front." He comes to this conclusion:—"On the whole, we are of opinion that the right of a wharfinger to bring an action or file a bill on account of an obstruction in the river which renders the access to his wharf less convenient, and his right to bring an action or suit on account of obstruction in the river which deprives him of all access to his wharf, depend on the same legal principles, namely, that he suffers a particular damage from a public nuisance, and that in neither

case is there a violation of any private right of his, distinct from the public right of navigation which is in all the Queen's subjects."

Had this stood unreversed, I should have thought it a very weighty authority, in confirmation of what I think was the opinion of Lord Chancellor Cranworth and Lord St. Leonards in Caledonian Ry. Co. *v.* Ogilvy, 2 Macq. 229. But it was reversed by the unanimous opinion of the House of Lords, the Lord Chancellor (Cairns) saying it was decided by this House in Duke of Buccleuch *v.* Metropolitan Board of Works, Law Rep. 5 H. L. 418, and Metropolitan Board of Works *v.* McCarthy, Law Rep. 7 H. L. 243, that when the public right is connected with access to a particular wharf, it becomes "a portion of the valuable enjoyment of the land, and any work which takes it away is held to be an injurious affection of the land, that is to say, the occasioning to the land of an injuria or infringement of the right." Lord Chelmsford says, "When this House decided, in the above cases, that the owners of land on the rivers were injuriously affected by having their access to the river cut off, as the test of such injury was the right to maintain an action if no statutory powers had been granted, the decisions are directly opposed to the judgment of the Lords Justices, and if they had considered them, must, I venture to think, have led them to a different conclusion."

Both these noble and learned Lords had been parties to the decision of Metropolitan Board of Works *v.* McCarthy, Law Rep. 7 H. L. 243, and their opinions in this case show how they understood their own decisions. Lord Selborne had not, so far as I know, been a party to any previous decision. But he now very clearly states the point on which there is a difference between the view of the law taken by this House in Metropolitan Board of Works *v.* McCarthy, Law Rep. 7 H. L. 243, and that taken by Lord Cranworth certainly, and I think by this House in Caledonian Ry. Co. *v.* Ogilvy, 2 Macq. 229. He says, "It was admitted that if the case had been for compensation under the Lands Clauses Acts, the land of the riparian proprietor would, by the deprivation of this water frontage, be injuriously affected. But unless this was an interference with some right or privilege recognized by law as belonging or incident to land, it would be no actionable wrong as an injury to the land, although not authorized by Parliament, and in that case the land would not be injuriously affected. If, on the other hand, it is an interference with a right or privilege recognized by law as belonging to the land, that right or privilege is certainly not identical with the public right of navigation."

This seems to me a direct decision, both that an action for such particular damage as the deterioration of land from the obstruction of a public way is an action for an infringement of a right attached to the land, and also that this was deliberately determined to have been the ratio decidendi of this House in Metropolitan Board

of Works v. McCarthy, Law Rep. 7 H. L. 243. If this is in conflict with the previous decision in Caledonian Ry. Co. v. Ogilvy, 2 Macq. 229, and in candor I must admit that I think it is, I think we ought to follow the later and more deliberate decision. In this case, if I were forming a judgment independent of the authoity of this House, I should come to the same conclusion; but I prefer to base my judgment on the authority of the latter decisions.

LORD WATSON, having stated the facts, proceeded:

My Lords, the award of the arbiter cannot receive effect if, in these circumstances, the respondents' property has not been "injuriously affected" within the meaning of the Lands Clauses Consolidation (Scotland) Act of 1845. The words "injuriously affected" must have precisely the same meaning in the Scotch Act as in the similar statute passed for England in that year; and, in my opinion, the present case is within the principle established by the judgment of this House upon the construction of the English Act, in Metropolitan Board of Works v. McCarthy, Law Rep. 7 H. L. 243.

In McCarthy's Case, Law Rep. 7 H. L. 243, the Lord Chancellor (Earl Cairns) said: "The proper test is to consider whether the act done in carrying out the works in question is an act which would have given a right of action if the works had not been authorized by Act of Parliament. I do not pause to consider whether or not, if the question was now to be decided for the first time, it is not a test somewhat narrow. I accept that test as being the test which has been laid down, and which has formed the foundation for the decision of so many cases before the present." The rule was stated, in similar language, by Lord Hatherley and Lord Penzance; and it appears to have been accepted by the other noble and learned Lords who took part in the decision of the cause.

The rule thus formulated does not apply with precision to the law of Scotland, which does not, in cases like the present, recognize that distinction between the remedies of action and indictment, upon which the test is founded. But that which satisfies the test, that which gives a right of action in England, has been defined in the case of McCarthy as well as in previous decisions. When an access to private property by a public highway is interfered with, the owner can have no action of damages for any personal inconvenience which he may suffer, in common with the rest of the lieges. But should the value of the property, irrespective of any particular uses which may be made of it, be so dependent upon the existence of that access as to be substantially diminished by its obstruction, then I conceive that the owner has, in respect of any works causing such obstruction, a right of action, if these works are unauthorized by Act of Parliament, and a title to compensation under the Railway Acts, if they are constructed under statutory powers.

The facts of the present case appear to me so clearly to bring it within the rule thus explained, that I consider it quite unnecessary to institute a minute comparison between these and the circumstances in which McCarthy's property was held to have been injuriously affected. Indeed, the similarity if not identity of the two cases was so apparent that the argument by which the able counsel for the appellants sought to distinguish the present from McCarthy's Case (Law Rep. 7 H. L. 243) mainly consisted in an endeavor to show that there were certain physical conditions attaching to the rule laid down in that case by the House. These conditions were that in order to found a claim of compensation, the works causing obstruction to access must be in proximity to, and also ex adverso of, the property alleged to be injuriously affected.

I cannot find a single word in the opinion of the noble and learned Lords who decided McCarthy's Case (Law Rep. 7 H. L. 243), or anything in the facts of that case, capable of giving a color to the appellants' contention. In point of fact, the appellants' works obstructing Canal Street and Victoria Street are less than 100 yards from the respondents' property, whereas the works of the Metropolitan Board, by which his access to the Thames was cut off, were upwards of 120 yards distant from, and were in no reasonable sense ex adverso of, Mr. McCarthy's premises. Probably the dock, which came to within twenty feet of the premises, would be discontinued after it ceased to have communication with the river; but it seems plainly to follow from the judgments delivered in that case, that if McCarthy's access, instead of being wholly cut off by the river wall which the Board erected, had been made so inconvenient that the value of his premises was in consequence materially lessened, he would still have had a good title to compensation.

It was also maintained by the appellants that the present case is ruled by the decision of the House in Caledonian Ry. Co. *v.* Ogilvy, 2 Macq. 229; and that the injury sustained by the respondents must therefore be held to be of the same kind as the personal inconvenience experienced in a greater or lesser degree by all members of the public who may have occasion to use the streets in question.

The claim which, in Ogilvy's Case (2 Macq. 229), had been affirmed by a jury, was for compensation in respect of injury to the claimant's mansion-house and policy, by reason of the railway crossing upon the level a public road which formed the main access to the claimant's avenue; it being also alleged, in the claim, that the injury was aggravated by certain inconveniences which were plainly attributable, not to the construction of the railway, but to its use. It was not alleged that there was any peculiarity in the construction of the level crossing which per se occasioned incon-

venience to the occupants of the claimant's property. The two noble and learned Lords by whom the case was decided agreed in opinion that the verdict could not stand, inasmuch as the claim disclosed matters amounting to personal inconvenience, but which did not injuriously affect the claimant's property. It does not admit of dispute that the judgment agrees, in its result, with subsequent decisions of the House, so far as concerns those elements of the claim which were derived from "the passing and noise of the engines and trains;" and since the case of Brand (Law Rep. 4 H. L. 171), these would be rejected, not as being matters of personal inconvenience merely, but as matters in respect of which, however injurious to property they might be, all claim for compensation has been excluded by the policy of the Railway Acts.

That being so, it was impossible that the claim, as made, or the verdict following upon it, could be sustained in law, but as I understand their judgments, both of the noble and learned Lords dealt with the claim as in substance a claim in respect of injury to property arising from the proximity of a level crossing, and treated the inconveniences resulting from the use of the railway as incidents of that claim; and it appears to me that their Lordships intended to decide that in that case, at all events, the mansion-house and policy of the claimant could not be "injuriously affected" by the mere fact of the railway crossing, upon the level, the public road which formed the main access to the house and policy.

The present case does not involve any question of level crossings, nor are any of the inconveniences, for which the arbiter has awarded compensation, due to the uses which the appellants make of their line. The judgment in Ogilvy's Case, 2 Macq. 229, whatever view may be taken of it, has, in my opinion, no real bearing upon the questions raised in this appeal; and I therefore do not express any opinion upon the question, which was raised in the argument, whether Ogilvy's Case, 2 Macq. 229, and McCarthy's Case, Law Rep. 7 H. L. 243, are or are not in all respects reconcilable. I am not prepared to say that they are not. On the other hand, were a jury or arbiters to find that, apart from all inconveniences arising from use of the railway, the selling value of a house was depreciated to the extent of £50 or £100 by the formation of a level crossing upon a highway affording access to it, I am not, at this moment, prepared to hold that it would be consistent with the principle of McCarthy's Case, Law Rep. 7 H. L. 243, to deny effect to that finding.

I have nothing to add to what has been said by your Lordships in regard to the construction of the undertaking given to the respondents in consideration of their withdrawing their opposition to the Bill promoted by the appellants.

I am accordingly of opinion that the interlocutors under appeal ought to be affirmed.

Interlocutors appealed from affirmed; and appeal dismissed with costs.

Agents for appellants: Grahames, Wardlaw & Currey.

Agents for respondents: Martin & Leslie.

MIDLAND RY. CO.

v.

HAUNCHWOOD BRICK AND TILE CO.

(*L. R.* 20, *Chan. Div.* 552. *March* 22, 1882.)

The word "mines" in the 77th section of the Railways Clauses Act, 1845, includes minerals whether got by underground or by open workings; and therefore a bed of clay, on which the railway had been made, was as a mine excepted out of the conveyance of the land to the railway company, and might, unless the company were willing to make compensation to the land-owner, be dug and worked by him.

THE Midland Ry. Co. were, by an Act passed in 1861, incorporating the Railways Clauses Consolidation Act, 1845, authorized to make a railway which would pass through lands at Nuneaton belonging to one W. S. Dugdale and his mortgagees. The Ry. Co. gave the usual notices, and by an indenture dated the 9th of July, 1863, the land on which the railway was constructed was conveyed by W. S. Dugdale and his mortgagees to the Ry Co., the conveyance not containing any reservation or any express grant of mines or minerals. The railway, there, was in a cutting going through a bed of brick and fire-clay. In 1881 the Haunchwood Brick and Tile Co., claiming as licensees under W. S. Dugdale and his mortgagees, gave notice to the Ry. Co. of their intention to work the clay under the land so conveyed to the Ry. Co. The Ry. Co. brought this action against the Brick and Tile Co., alleging that the purchase-money paid for the land was ascertained under the provisions of the Lands Clauses Act, and to the best of their belief included the value of the clay; also that the only proper mode of working the clay was by coming on the surface and so taking it; and claiming an injunction to restrain the Brick and Tile Co. from entering on the surface of the Ry. Co.'s land, and from digging or working the clay in any manner not usual; and from working any clay so as to injure a bridge which had been built by the Ry. Co.

The Brick and Tile Co. denied that the clay could only be worked from the surface, and denied that the value of the clay, which was many thousands of pounds, was included in the price given for the land, which was about £100 an acre.

Each of the parties produced evidence in support of their respective allegations; but the case was mainly decided on the question whether under the 77th clause of the Railways Clauses Act* clay was included under the word "mines," so as to be excepted from the conveyance to the Ry. Co.

Davey, Q.C., Giffard, Q.C., and P. Beale, for the Ry. Co.:

There is no reservation in the conveyance, and it is for the defendants to show that the clay did not pass. The only word in the Act is "mines," and that does not include clay. In no decided case has anything not a mine in the ordinary sense of the word been held to be excepted. The railway actually rests on the clay, and if that does not belong to the Ry. Co., what does belong to them, and what did pass by the conveyance? Bricks may be made of almost any earth, and the railway companies might be obliged, in fact, to buy their land many times over.

The word "mine" does not include an open cutting: Bell *v.* Wilson, Law Rep. 1 Ch. 303; Attorney-General for Isle of Man *v.* Mylchreest, 4 App. Cas. 294; Midland Ry. Co. *v.* Checkley, Law Rep. 4 Eq. 19; Hext *v.* Gill, Law Rep. 7 Ch. 699; Dixon *v.* Caledonian and Glasgow Ry. Cos., 5 App. Cas. 820. Great Western Ry. Co. *v.* Bennett, Law Rep. 2 H. L. 27, decides that a railway company is not obliged to take a mine which may never become dangerous, but the surface of the land can never be worked without destroying the railway. If the clay could be got by underground working it might be included in the word "mine," but this clay cannot, or at all events clay in that district never has been, got in that way. Even if the railway ran through coal at the surface, and the company had bought and paid for the land, the coal on which the railway stands must be included in their purchase: Rex *v.* Inhabitants of Sedgley, 2. B. & Ad. 65; Rex *v.* Brettell, 3 B. & Ad. 424; Darvill *v.* Roper, 3 Drew. 294.

Rigby, Q.C., and Ingle Joyce, for the Brick and Tile Co.:

The word "minerals" certainly includes clay, and mines as here used is synonymous. The price shows that this valuable clay was not intended to be sold. This provision of the Act is for the benefit of the railway companies, in order that they should not be obliged to pay for minerals which might never be worked. But when they are worked they are to be paid for, and unless minerals are expressly included in the conveyance they do not pass. It seems to be admitted that the clay might be worked underground,

* 8 Vict. c. 20, s. 77: "The company shall not be entitled to any mines or coal, ironstone, slate, or other minerals under any land purchased by them, except only such parts thereof as shall be necessary to be dug or carried away of used in the construction of the work, unless the same shall have been expressly purchased; and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby."

and yet the damage to the railway would be as great. London and Northwestern Ry. Co. *v.* Ackroyd, 31 L. J. (Ch.) 588, does not apply. The company bought the right to make the railway and to use the clay as a support until it was wanted: Errington *v.* Metropolitan District Ry. Co., 19 Ch. D. 559. If the contrary view is adopted, the companies will have to pay for all the minerals under the land whenever they buy a piece of land, and there must in each case be an inquiry as to the possible value of the minerals.

Giffard, in reply:

It has never been decided what the word "mines" in the Act means, and the usual meaning is what is worked underground. When a railway passes through a tunnel, surely the minerals above it are included. It is not true that all minerals are excepted, for such as are dug in the course of the railway are not. A landowner cannot, after having been paid for his land, have a right to destroy the railway which stands upon it.

March 22. KAY, J.—The question in this case is as to the meaning of the word "mines" in the 77th and following sections of the Railways Clauses Act of 1845. The primary meaning of the word "mine" standing alone is an underground excavation made for the purpose of getting minerals, as in Bell *v.* Wilson, Law Rep. 1 Ch. 303. In leases and similar documents it is commonly used in a slightly different sense. For instance, "All that mine, vein, or seam of coal, etc." There the word includes the stratum of the minerals as well as the excavation made to win it. "Minerals," on the other hand, means primarily all substances (other than the agricultural surface of the ground) which may be got for manufacturing or mercantile purposes, whether from a mine, as the word would seem to signify, or such as stone or clay, which are got by open working, as decided in Midland Ry. Co. *v.* Checkley, Law Rep. 4 Eq. 19; Earl of Rosse *v.* Wainman, 14 M. & W. 859; Hext *v.* Gill, Law Rep. 7 Ch. 699. The particular signification of each of these words may be varied largely by the context.

The group of sections in the Railways Clauses Act which have to be construed is prefaced by the words "And with respect to mines lying under or near the railway be it enacted as follows." Sect. 77 provides that the company shall not be entitled to any mines of coal, ironstone, slate, or other minerals, under any land purchased by them. Stopping there, those words are susceptible of two meanings. They may mean that the company shall not be entitled to any mines of coal, mines of ironstone, mines of slate, or mines of other minerals; or they may mean that the company shall not be entitled to any mines of coal or to any ironstone or to any slate, or to any other minerals, confining the word "mine" to coal, and using it as meaning both the coal and the working. The

next words, "except only such parts thereof as shall be necessary to be dug or carried away, or used in the construction of the works," put it beyond doubt, whichever of these two interpretations be adopted, that "mines" does not mean merely underground excavation, but certainly includes some minerals, and these words also show that the minerals intended are such as in the making of the railway, it may be necessary to dig or carry away, and therefore they are minerals that might not lie very deep, and further, such as may be used in the construction of the works, which seems to signify substances like stone, which may be used without being dug, or possibly which may be dug and used as distinguished from carried away, as clay, which may be made into bricks or stone, and so used for building bridges or other structures. Then follow the words "unless the same shall have been expressly purchased," clearly giving the company power, if they think fit, to purchase the minerals, whatever they are, at the time when they buy the rest of the land, as was recently decided in Errington *v.* Metropolitan District Ry. Co., 19 Ch. D. 559. And last come the words "And all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands unless they shall have been expressly named therein and conveyed thereby."

There we have again the word "mines" alone used to describe all that is mentioned in the former part of the section. Now beyond question mines in that section, taking it altogether, does not mean merely underground excavations for the purpose of getting minerals. The word as there used certainly includes minerals, and the question is narrowed to this, Does it mean only minerals which are got by mining—that is, by underground workings—or does it include such as are got by open workings also? Is the general purport of the section restricted by the use of the word "mines," or is the meaning of that word enlarged by the context? The provision is one which, as Lord Chelmsford said in Great Western Ry. Co. *v.* Bennett, Law Rep. 2 H. L. 27, is evidently intended for the benefit of railway companies. It relieves them from the necessity of purchasing costly minerals when they buy the land, and the sections that follow empower them to prevent any damage being done to the line afterwards by the working of these unpurchased minerals. There is no reason, therefore, for putting a narrow and restricted construction upon the word "mines." As I have pointed out, it clearly includes not only such minerals as may be dug and carried away, but such as may be used in the construction of the works, which can hardly be confined to minerals which could only be got by mining. But it is legitimate and necessary to look at the succeeding sections to see if they contain anything to make the meaning more clear. Section 78 provides that notice shall be given by the owner of his intention to

work, and the words there used are, "any mines or minerals lying under the railway or any of the works connected therewith," or within forty yards therefrom. On receipt of such notice, the company may cause "such mines" to be inspected, and if "the working of such mines or minerals" is likely to damage the line, it may be prevented "if the company be willing to make compensation for such mines." In that section the word "mines," which was before used to include the minerals in a mine, is contrasted with the word "minerals," which, therefore, according to reasonable construction must mean something other than minerals got from mines—that is minerals from open workings; if not, a clay pit or quarry might be worked in land not purchased within forty yards of the abutment of a bridge or viaduct, so as to endanger the whole structure, and the company would have no right even to cause such a working to be inspected unless it was included in the word "mines." But the last words which I have referred to are most material. "If it appear to the company that the working of such mines or minerals is likely to damage the works of the railway, and if the company be willing to make compensation for such mines or any part thereof," the owner thereof shall not work or get the same. "Such mines" is there used as equivalent to "mines or minerals." The words "the working of such mines or minerals" show that, in that sentence, mines does not mean an excavation only, but includes the minerals thereby got. The words "or minerals" must, therefore, mean minerals got otherwise than by mining, and the sentence providing for compensation for "such mines," shows that "mines" is used to mean the same "as mines or minerals," and the section prohibiting the owner from working points to the same conclusion, because "working" applies to a mine, but "getting" more properly refers to minerals. In section 79, "the said mines," "such mines," "such mines or minerals," are used apparently as phrases having the same signification. Section 83 gives power to the company after twenty-four hours' notice to enter upon any lands in which any "such mines" are being worked, to inspect the same, and unless "such mines" include open workings, it would not enable them to enter on land to inspect a quarry or clay pit. The grammatical construction, therefore, rather favors the larger signification of the word "mines," making it include not only minerals got by mining, but also by open workings.

Then it is necessary to consider what may be the more probable intention. It is urged on the one hand that the intention was to compel railway companies at once to purchase surface minerals, and only to give them this option to postpone purchase as to mines properly so called; on the other hand, the option may be intended to include surface minerals, which, like a bed of china clay, are sometimes of great value, but are not likely to be worked for some

time. It is also argued that there are always some surface minerals that are merchantable, and that the latter construction might cause great expense and inconvenience to companies, and might subject them to receive notice of intended quarrying all along their lines; but this objection would also apply to mines properly so called. Minerals really merchantable not lying in mines are not so generally to be found as that argument supposes; and if it appeared that any notice of an intention to work was not bona fide, the Court would have ample power to deal with such a case. The counter argument is that the object being to relieve the company from outlay in the first instance, this is better effected by adopting the larger meaning of the word "mines," and a few words in the original conveyance, if the parties desire it, may pass the surface minerals with the land.

But this group of sections is prefaced by the words "And with respect to mines lying under or near the railway." This, as was held in Great Western Ry. Co. *v.* Bennett, Law Rep. 2 H. L. 27, renders inapplicable the cases of Caledonian Ry. Co. *v.* Sprot, 2 Macq. 449, and Elliot *v.* North Eastern Ry. Co., 10 H. L. C. 333. And unless these sections apply to minerals which may be worked by open workings within forty yards of the railway, the company would have no power to inspect such workings or to purchase them, or to prevent the owner from working them, though doing so might destroy the railway. This cannot be intended.

With respect to authority, there seems to be no English case in which this question has been decided. In Great Western Ry. Co. *v.* Bennett, Law Rep. 2 H. L. 38, Lord Chelmsford says, "The provision contained in this section is extremely beneficial to railway companies. They are not to have any mines or minerals, that is (any part of the mines or minerals) under the land purchased by them; but they may secure sufficient support to the railway by purchasing it from the owner of the mines, or, if they think it likely that the mines under the railway may not be worked for an indefinite period, they may postpone the purchase until the necessity for it arises. That this section reserves to the mine-owner all the minerals however near they may be to the surface, unless the company choose to purchase them, appears very clearly from the exception of 'the parts necessary to be dug or carried away, or used in the construction of the company's works,' as these will of course be the minerals lying nearest to the surface." Lord Cranworth, said: (Law Rep. 2 H. L. 40): "It was obviously the intention of the Legislature in making these provisions to create a new code as to the relation between mine-owners and railway companies, where lands were compulsorily taken for the purpose of making a railway. The object of the statute evidently was to get rid of all the ordinary law on the subject, and to compel the owner to sell the surface, and if any mines were so near the surface that they must

be taken for the purposes of the railway, to compel him to sell them; but not to compel him to sell anything more. The land was to be dealt with just as if there were no mines to be considered; nothing but the surface." Lord Westbury said, referring to the 77th section (Law Rep. 2 H. L. 41), "In the face of these words, there is no room for the ordinary implication which applies to a common grant, namely, that it extends by implication to all that, though not named, which is necessary for the support or enjoyment of the thing granted." He then refers to the notice, and says, "If the company should not think it requisite, the mine-owner is left under no other obligation than that he is to win the mines in a proper manner."

In Great Western Ry. Co. *v.* Fletcher, 5 H. & N. 689, 698, Cockburn, C. J., said: "Now, what the Act of Parliament means is this. All that the railway company requires is the surface soil; it may be that the minerals will never be worked by the landowner, in which case the company ought not to be subject to any expense: and therefore the Legislature interposes and says that the company shall be under no obligation to pay the landowner for that which may never be required; but if the mines come to be worked, and the company require them as necessary for the support of the surface, they must make compensation to the landowner." This language certainly favors the construction which appears to me the more probable; the point, however, was not essential to the decision in that case.

But in a Scotch case of Jamieson *v.* North British Ry. Co., 6 Scot. Law Rep. 188, the very question was decided by Lord Ordinary Kinloch, on the Scotch Railways Clauses Act, which is for this purpose identical with the English Act. It was there determined that freestone worked by an open quarry was within the reservation; and in another Scotch case of Dixon *v.* Caledonian and Glasgow Ry. Cos., 5 App. Cas. 820, the Lord Ordinary Adam arrived at a similar conclusion as to a limestone quarry worked by open workings, which was in no sense a mine.

The subject of litigation in this case is a bed of clay used for making a peculiar kind of brick, and of some value, from the circumstance that it contains a certain amount of iron. There are three or four feet of surface earth above this, except at one point where it crops out, but it is in no sense a mine, being got entirely by open workings. The railway has been made in a cutting which is in the bed of clay itself, so that the ballast, sleepers, and rails are laid upon the clay. I must take it that notice has been given by the defendants of their intention to work, and no counter-notice by the plaintiffs. It is argued that even if the clay be reserved, yet the owners cannot work it because, according to these provisions, particularly sect. 79, they can only employ the usual mode, and that being by open workings, they must dig from the surface of

the line, and this would be a trespass. But this seems to me an ingenious distortion of the provision, which is clearly intended in the company's favor, in case a mine is worked under or near the line, to prevent unnecessary excavation, which might cause more risk or damage than the usual mode of working. It cannot mean that the owner of a bed of clay shall only work it by trespassing, so as to enable the company to prevent him from working it at all. It is clear that the clay may be got and the railway destroyed by working from the side and excavating without going upon the railway at all; and as letting down the surface is, according to Great Western Ry. Co. *v.* Bennett, Law Rep. 2 H. L. 27, not a trespass or wrong, I do not think, if the clay is reserved, that the company would be entitled to an injunction, on this ground, to prevent the working. According to Dixon *v.* Caledonian and Glasgow Ry. Cos., 5 App. Cas. 820, the company can give a counter-notice and have the value of the clay assessed, and by paying for it can prevent the owner from working. It was also argued, but not very confidently, that the defendants are not owners, lessees, or occupiers within the statute, because they have only a license to work under the railway; but by this license they have the right of occupation, and are owners of all minerals which they can get. I do not think that this objection can avail. I must therefore refuse to grant any injunction, and dismiss the action, with costs.

ERRINGTON

v.

METROPOLITAN DISTRICT RY. CO.

(*L. R.* 19, *Chan. Div.* 559. *Feb.* 14, 17, 1882.)

A railway company having the usual power to purchase lands under its special Act has, by virtue of the 6th section of the Lands Clauses Act, 1845, power also to purchase the minerals under those lands compulsorily at any time before the expiration of the time limited for the exercise of its compulsory powers, if it should deem it advisable.

That power is not taken away by the 77th and following sections of the Railways Clauses Act, 1845, which are for the benefit not of the mine owner but of the company, and only exempt the company from the obligation of buying the minerals at once together with the surface lands.

The words "expressly purchased" in the 77th section are not to be confined to "purchased by agreement."

There is no distinction between the severance of ownership vertically, that is, of the surface lands from the mines beneath, and the severance of ownership laterally by the taking by successive purchases of surface lands from the same landowner. So a railway company having already acquired surface lands may subsequently purchase compulsorily the minerals under those lands.

The opinion of the company's engineer, if bona fide, is the only evidence required by the court as to the necessity or propriety of any purchase, and the onus of proving want of bona fides rests upon the party opposing the purchase:—

Injunction granted against the company by Hall, V. C., discharged.

The Metropolitan District Ry. Co. were empowered by a special act, the Metropolitan District Railway Act, 1878, which incorporated the Lands Clauses Consolidation Acts, and the Railways Clauses Consolidation Act, 1845, to extend their railway to Fulham, and to purchase lands compulsorily.*

The plaintiffs were the owners in fee of certain lands situated at Walham Green, and the company served upon them three notices to treat for the purchase of 6*a.* 0*r.* 36*p.* of such lands. The notices were dated respectively the 8th of August, 1878, the 26th of February, 1879, and the 18th of March, 1879. None of the notices made any reference to the mines and minerals under the said lands.

The question of compensation in respect of the said notices was referred to arbitration, and the arbitrator made his award on the 20th of December, 1879, valuing the land at £11,660, based upon the footing of the land being building land; the award was also silent as to the mines and minerals.

The company sent to the plaintiffs' solicitors the draft conveyance of the lands for approval. In that conveyance the company had inserted the words "mines and minerals," but these words the plaintiffs' solicitors struck out, contending that the company had not "expressly purchased" them and that they had not passed to the company.

On the 19th of October, 1880, the company took out a summons under the Vendor and Purchaser Act for a direction that the words struck out should be inserted in the conveyance. The summons having been adjourned into court, Vice-Chancellor Hall, on the 11th of December, 1880, decided that the minerals had not been "expressly purchased" within the meaning of section 77 of the Railways Clauses Act, 1845, and dismissed the summons, and that decision was affirmed on appeal in July, 1881.

The time limited to the company for the exercise of their compulsory powers expired in July, 1881.

On the 17th of June, 1881, before the hearing of the appeal, the company served a fresh notice on the plaintiffs, that "in the event of its being determined that the company in the purchase already

* Sec. 5: "Subject to the provisions of this Act the company may make and maintain in the lines and according to the levels shown on the deposited plans and sections the railways and works hereinafter described, with all proper stations, sidings, approaches, floating-stages, works, and conveniences connected therewith, and may enter upon, take, and use such of the lands delineated on the deposited plans and described in the deposited book of reference as may be required for those purposes."

made by them from the plaintiffs of the lands and hereditaments specified in the schedule to the notice (being the 6*a.* 0*r.* 36*p.*) have not acquired the mines and minerals in and under the same they require to purchase and take all such mines and minerals," and required the plaintiffs to deliver particulars of their estate and interest in the said mines and minerals.

The plaintiffs on the 8th of July, 1881, issued their writ in this action against the company, claiming an injunction restraining the defendant company, their servants, etc., from further proceeding under or in pursuance of their notice to treat of the 17th of June, and from taking any steps to procure the assessment of the purchase-money of the mines and minerals and property comprised in the notice.

An interim injunction was granted on an interlocutory application, and the action came on on the 3d of December, 1881, on motion for judgment, neither party putting in any pleadings.

The engineer of the company made an affidavit in which he said that the lands already purchased were lands necessary for the railway company for the formation of their line and stations, with goods depôts and sidings and buildings necessary thereto; that he knew well the said lands, and did not believe that there were minerals in them except gravel or clay, which could only be got by removing the surface of the land; that it would be wholly incompatible with the purpose for which the railway company desired the said lands that power should remain in the plaintiffs to interfere with the surface of the land and thus with the buildings, sidings, and works of the railway.

The solicitors of the plaintiffs and defendants respectively also filed affidavits, Mr. Tweedie, the plaintiffs' solicitor, stating his belief that the mines and minerals were not necessary either for the construction of any of the works of the company or otherwise for the purposes of their undertaking.

Mr. Baxter, the company's solicitor, after generally confirming the statement of the engineer, stated in the last paragraph that land could not be sold as building land reserving any right to interfere with the surface, and that the company in selling land for building would have to give up their claim to any minerals under the same, inasmuch as those minerals could not be got without removal of the surface of the land.

Hastings, Q. C., and Archibald, for the plaintiffs:

This case comes within the sects. 77, 78, and 79 of the Railways Clauses Act, 1845. The company in their notice to treat for the surface land did not "expressly" state that they would purchase the minerals under it, and consequently the minerals belonged to the plaintiffs. A similar question was decided in the case of Fletcher v. Great Western Ry. Co., 4 H. & N. 242; 5 H. & N. 689, and

by the House of Lords in the case of Great Western Ry. Co. *v.* Bennett, Law Rep. 2 H. L. 27–41.

The company had under the provisions of their own Act power to acquire six acres of land, but it is submitted that they had no power on the true construction of the Act to purchase the minerals. If they had such a power, it was before the last notice was completely exhausted. They had no right to give a further notice to treat for the purchase of the minerals; therefore, the plaintiffs are entitled to the injunction which they ask for, and it should be made perpetual, and with costs.

Kekewich, Q. C., and Samuel Roberts, for the defendants:

The company are willing to purchase and pay for the minerals which lie under the land which they have acquired from the plaintiffs, but the plaintiffs decline to treat for the sale of them. There can be no doubt, it is submitted, that the company have under the provisions of the Lands Clauses Act, 1845, power to purchase these minerals, as they had power to purchase the surface land. Their power is not exhausted, as it does not matter in law whether they give two, three, or more notices to treat for that which they require and wish to purchase. The minerals form part of the land which the company were authorized to purchase. They purchased one part of that land, and now they desire to purchase another part of it. They are under no obligations to purchase the minerals, though they have power, and now wish to do so: Smith *v.* Great Western Ry. Co., 2 Ch. D. 235; 3 App. Cas. 165.

The question no doubt turns upon the construction of the 77th, 78th, and 79th clauses of the Railways Clauses Act, 1845, and some strange results might happen under some circumstances; for instance, suppose land were purchased for the purpose of a tunnel, and coal or ironstone was found there, and which it would be necessary to carry away. They would pass by the conveyance. That is to say what could be carried away would pass, but what was below the permanent railway would not pass. The real solution of the question raised here is that the company have power to purchase, but cannot be compelled to do so. When the owner is desirous of working any mine under or near the railway he must give the proper notice as provided in sect. 78, and the company can purchase, and if they do not, they must submit to any damage that may result from the working of the mine. The company have done everything required by the statutes. They wish to "expressly" purchase these minerals, and they ought to be allowed to do so: Dixon *v.* Caledonian and Glasgow, and South Western Ry. Cos., 5 App. Cas. 820; Dart, Vend. and Pur., Vol. i. 5th Ed. p. 371. They also referred to Martin *v.* London, Chatham and Dover Ry. Co., Law Rep. 1 Eq. 145; 1 Ch. 501.

HALL, V. C.—It seems to me that the defendants—the company

—are not under the circumstances appearing in this case entitled to proceed under the notice which they have given to the plaintiffs to treat for the purchase and take these minerals. It must not, however, in any way be understood that I mean to decide that the company when they gave the first notice to treat for the purchase of and take the land necessary for their line of railway, were not competent to say that they desired to take the land and the minerals under it. Such a notice as that they were entitled to give, and if they had given it, they would be entitled to the minerals as well as to the surface land. They would then have given "express" notice to take the minerals, and would have been entitled to have a conveyance of them with the surface land. That would have brought them within the 77th section of the Railways Clauses Act, 1845, and they would have "expressly purchased" the minerals as therein provided. I do not say that it would be necessary under such circumstances that the conveyance should expressly mention the minerals. They would pass if they had been expressly purchased. But when a notice has been given in proper form to take land, and it did not indicate any intention to take the minerals, I consider that as regards the notice it only applies to the land. The notice must be given once for all as to the land required, under the clauses in the statute, and without the minerals. That is to say when once the notice is given it applies as from that time, assuming of course that the parties do not come to any further arrangements. The rights of the parties inter se, as regards the minerals, are settled by the statute. From the date of the notice—the rights being so settled—it is not competent for the company to alter them by giving a further notice, and in this very case, when it was before the Court of Appeal on a former occasion, that was, I consider, the opinion of one of the learned Judges. It seems to me to be plain that the company could not go on giving notices to purchase the property in pieces—first the land and then the minerals. There is no necessity for a repetition of the notice in regard to the same piece of land, as the mode of proceeding by the railway company is sufficiently provided for by the 78th and 79th sections of the statute. Upon the construction of the three sections it seems to me that it was not competent to the company to give the notice in question, and that the plaintiffs were right in coming to the court for an injunction, which I now grant, with costs to be paid by the company.

From this decision the company appealed. The appeal came on to be heard on the 14th and 17th of February, 1882.

Davey, Q. C., and Kekewich, Q. C. (S. Roberts with them), for the company:

The question is whether a railway company has power to purchase mines compulsorily if it deems it advisable. There is no distinct decision upon the point, but there are dicta of judges both

ways. The Vice-Chancellor has decided only that the company having elected by their original notices to take lands without the minerals have exhausted their compulsory powers, and cannot now, although within the time limited, give notice to treat for the purchase of the minerals under the same lands.

If it were not for the 77th, 78th, and following sections of the Railways Clauses Act, a railway company, like any other company, would under the 6th section of the Lands Clauses Act be able to purchase mines—mines being included in the word "lands" used in that section—but those sections do not deprive a railway company of any right, but are enacted for the benefit, not of the mine owner, but of the company, exempting the company from the obligation of purchasing the mines at once, while giving it means of acquiring possession of them or preventing the working of them by the owner to the injury of the railway. The 77th section by its very wording impliedly assumes that a company may purchase mines, and there is nothing to show that the words "expressly purchased" in that section have reference only to a purchase by agreement.

We rely on what was said by Cairns, L. C., in Smith *v.* Great Western Ry. Co. (3 App. Cas. 165, 180), and that case does incidentally decide that "lands" include mines, and The Great Western Ry. Co. *v.* Bennett, Law Rep. 2 H. L. 27, is no authority against the power of a company to purchase mines. The decision there was that the company could not give a counter-notice after the expiration of the thirty days after the notice of the mine-owner, and there are dicta in the judgments of Lord Westbury and Lord Cranworth in that case in our favor.

The term "minerals" includes everything which can be got out of the land of a merchantable character, and useful for any purpose: Midland Ry. Co. *v.* Checkley, Law Rep. 4 Eq. 19, 25.

A railway company when purchasing surface lands is not bound to give notice once for all for all the land it requires—the only limit to the right of giving notice is that of time—and we submit that there is no more reason why land should not be treated as severed vertically, i.e., the surface from the mines below it, than that it should not be treated as severed horizontally—that is one acre of surface land from another acre of surface land.

There is nothing to impeach the bona fides of the opinion of the company's engineer as to the mines being required, and the Court will, therefore, according to its usual practice, accept that opinion as correct. The word in the 5th section is "required," not absolutely necessary.

Hastings, Q. C., and Archibald, for the plaintiffs:

Assuming for the purpose of argument that the company could have purchased these mines compulsorily if they had in their original notices specified the mines as part of the subject-matter of the

purchase, we submit that coming as they now do, after acquiring the surface, to ask to purchase these mines alone, they are bound to prove that that purchase is necessary for the purpose of their railway. Their only power to purchase at all, comes from the 5th section of their own Act and the 6th section of the Lands Clauses Act incorporated with it, and that power is confined to the purposes specified in the 5th section, that is, the "making and maintaining the railway, works, etc."

The mere general statement of their engineer that they are required will not do; he must specify the particular object for which they are required, to enable the Court to decide for itself on the bona fides of the claim: Flower *v.* London, Brighton and South Coast Ry. Co., 2 Dr. & Sm. 330; Eversfield *v.* Mid-Sussex Ry. Co., 3 De G. & J. 286.

The company have not shown that they require the minerals for any of the purposes specified in the 5th section, and from the affidavit of their solicitor it would appear that they are wanted with a view to a subsequent sale by the company of the property as superfluous land.

[JESSEL, M. R.—I think the authorities say that the statement of the company that they want it is sufficient, unless the other side prove that they do not.]

[Davey, Q. C., referred to Stockton and Darlington Ry. Co. *v.* Brown, 9 H. L. C. 246, and Kemp *v.* South Eastern Ry. Co., Law Rep. 7 Ch. 364.]

The Stockton railway case was the case of a purchase of surface lands, which, primâ facie, the company would require, and had no reference to mines.

The necessity for this purchase is distinctly put in issue by the affidavit of the plaintiffs' solicitor.

[JESSEL, M. R.—That affidavit is inadmissible. An affidavit made upon information and belief must state the source of information; a mere statement of belief will not do.]

The company cannot be exposed to any danger by not making this purchase, for if the mine-owner were to claim, to work and carry away the minerals the company would have their rights under the 78th section of the Railways Clauses Act.

Secondly, a railway company has no power at all to purchase mines compulsorily. The clauses of the Railways Clauses Act, as regards mines, form a distinct part of the Act, and the relations between a mine-owner and a railway company are to be gathered from those clauses only, although in Smith *v.* Great Western Ry. Co., 3 App. Cas. 165, the House of Lords, for the purpose of supplying a casus omissus in the 78th section of the Act, read together with it the 6th section of the same Act. But that section only refers to purchase by agreement, and the right of the company to

purchase by agreement is not disputed; that we submit is the explanation of sec. 77.

No case has decided that under their compulsory powers to purchase lands a railway company can also purchase mines, while in Great Western Ry. Co. *v.* Bennett, Law Rep. 2 H. L. 27, Lord Cranworth says, Law Rep. 2. H. L. 40, that only the minerals necessary for the purpose of the railway can be taken; all the rest of the minerals must be left till the time for working the mines arrive; and Lord Westbury in the same case, Law Rep. 2 H. L. 41, says a railway company is under a disability to purchase mines unopened. And in Great Western Ry. Co. *v.* Smith, 2 Ch. D. 235, 244, Lord Justice James expresses a similar opinion: and see per Vice-Chancellor Wood, in London and North Western Ry. Co. *v.* Ackroyd, 31 L. J. (Ch.) 588.

[Davey, Q. C., referred to the observations of Lord Chancellor Selborne in Dixon *v.* Caledonian and Glasgow and South-Western Ry. Cos (5 App. Cas. 820, 826) upon the effect to be attributed to a dictum.]

The reason is obvious, because the value of unopened mines cannot be assessed, and the Legislature may well have considered it unjust that while the company is not compelled to purchase the unopened mines, the landowner should be compelled by the company to sell, whenever the company might choose, that of which the value could not be ascertained. The company has the right of compelling the landowner to sell the surface, and the owner must have the correlative right of retaining the minerals.

Lastly, we submit that the Vice-Chancellor was correct in holding that the company, having originally given notice to treat for the lands, which did not include minerals, have exhausted their powers. The plaintiffs were the owners of the fee—were entitled to the land and also to the minerals—so any question as to giving notice to different owners, when the ownership of the surface and mines has been severed, has no application.

[They also referred to Webb *v.* Manchester and Leeds Ry. Co., 4 My. & Cr. 116, as showing the principles on which the Court will compel companies to exercise their powers.]

JESSEL, M. R.—This is an appeal from a decision of Vice-Chancellor Hall, raising important questions of construction as regards the Railways Clauses Act of 1845.

The points which have been raised in argument are three. The first proposition is, that under the powers of the Lands Clauses Act, 1845, and the Railways Clauses Act, 1845, a company having the usual powers to take land in their special Act cannot take minerals by compulsion apart from the land. The second point raised is that assuming the company can do so in any case, the company cannot do so if they have originally purchased the surface of the land

without the minerals, and that they are not entitled then to give a second notice to treat for the minerals. The third point raised was that whatever the powers of the company might be, the railway company are not entitled to purchase any land or minerals unless they are necessary for the purposes of their undertaking. Those are the three points.

Now, as regards the first point it is plain that the word "lands" in the Lands Clauses Act includes any hereditaments, which of course include mines. Upon that point there can be no question. Therefore, standing alone those words would include the power to purchase mines. Is there any reason for cutting them down? I am not aware of any. It must be remembered that the Lands Clauses Act is to be used, not only as regards railway companies, but all companies. Take a canal, or a dock, or a harbor company, and suppose the mines are owned by one man, and the surface by another—a very common case in the north of England. Now, if the harbor is to be made they will perhaps have to dig down and take some of the minerals away. If they could not give notice to the mine-owners they could not make the harbor, or the canal, or the dock. Therefore, in that case it is absolutely necessary that they should be able to take the mines. If, therefore, when the mines are severed they can take the mines, they can take the mines under the powers of the Lands Clauses Act. I think that requires no further demonstration. The Railways Clauses Act only applies to railways, and it says that "with respect to mines lying under or near the railway, be it enacted as follows:" and then follows the 77th section. If, therefore, the Lands Clauses Act enables the railway company to take mines where they are in a different owner from the surface, is there anything in the Railways Clauses Act which prevents them from taking them? I think not. On the contrary it says that they shall not be entitled to any mines except only what shall be necessary in the construction of the works, "unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such land unless they shall have been expressly named therein and conveyed thereby." Therefore, it shows that a company may purchase mines, and may have them conveyed. But it was suggested that the words "expressly purchased" were to be confined to purchase by agreement. I do not know why. The notice is as much express as any agreement. Those words cannot be used to cut down the power given by the Lands Clauses Act, which is a power to take the mines when they are in separate ownership. It does not appear to me that they were intended to cut them down, but on the contrary they recognize that the railway company may purchase if the railway company think fit. Then the 78th section provides for cases where they do not purchase, and then the mine-owner may work them on giving thirty

days' notice, unless the company make compensation. That is not a purchase, and it does not apply to mines which the company may purchase only, but applies to all mines within a certain distance of the railway, whether they are within the limit of the land described or not. It is of much wider application than to the purchase of mines.

That being so, why the railway company should be limited to that mode of acquiring the mines—I can hardly say acquiring, but that mode of preventing the working of the mines—I can see no reason at all. It may be said to be much more convenient to the railway company sometimes when it is raising its capital to buy the mines at once. At other times it may be more convenient to wait until it sees whether the mines will be worked or not. But it seems to me that this section, standing alone, is put in for the protection of the company, not as limiting their power at all, and therefore that it does not really affect the question as to their power to purchase.

The next point was this—having given a notice to take the surface, and having thus severed the ownership, can they buy the mines? It follows, from what I have said, that by the ownership being severed, they would have a power to take the mines unless there is something which prevents their taking them. Now, that something can only be the expiration of the time for purchase. There is no law which says that a railway company within the period fixed may not first take three acres and then three acres more from the same landowners, and if mines are included under the word "lands," why should there be a different law for taking horizontal strata to that which is applied to taking of vertical strata? I see no reason, and, with great deference to the Vice-Chancellor, I think there is no distinction between the severance of ownership of surface land and mines and severance of ownership laterally by taking three acres out of six from the same landowner. I think, therefore, that that objection cannot be supported.

The last objection was this. It was said that the company do not require the mines. As to that, I think the observations of Lord Cranworth in Stockton and Darlington Ry. Co. *v.* Brown, 9 H. L. C. 256, are of great value, and they fairly state the meaning of these Acts of Parliament. It is the company who are to be the judges of what they require unless they are not acting bona fide, and the evidence, and the only evidence required, is the opinion of the surveyor, or engineer, or other officer of the company, unless the other side can show that they are not acting bona fide. Now, of course, you can show want of bona fides in two ways. You may show it by proving that the lands are wanted for some collateral purpose as a fact, or you may show it by proving that the alleged purpose is so absurd, under the circumstances, that it cannot

possibly be bona fide. As regards the first ground, there was an attempt made here, but it was unsupported by evidence. It was the belief of a gentleman without any facts, and was not admissible in evidence at the trial of the cause. That, therefore, must be put out of the case. The second ground is this. It is said you cannot want the minerals at all, because you can be sufficiently protected by the 78th section. But the answer to that is very simple. The company are the judges whether they would rather have the mines now or wait until some one begins to work them. In this case we have the evidence of the engineer, which is very important. There are no mines, in the ordinary sense, under these lands, at least it is not shown there are. What are called mines and what are minerals probably within the meaning of the Act of Parliament are some beds of gravel or some beds of clay lying near the surface, and it is said they can only be worked from the surface. As far as I know gravel pits are always open to the surface; I never heard of a gravel pit which was worked as a mine. Of course you may find a stratum of gravel in a mine and bring the gravel to the surface. I am not speaking of that; but I am speaking of working for gravel only—the usual course of working for gravel is to work from the surface. It is the same with clay. There are cases of fire-clay, no doubt, in which it is worked by sinking pits like mines, but ordinary clay is worked from the surface. Therefore, when the engineer says that these strata of gravel and clay will be worked from the surface, that entirely accords with one's ordinary experience. It appears to me perfectly reasonable, although we are told we must consider it quite absurd. If that is so, if they do not buy them, the owner after thirty days' notice may break the surface and dig up the gravel and clay. Anything more serious to the owners of the station or the railway can hardly be imagined, and I think it is quite reasonable for them to say, "We want to prevent the risk of such an evil by buying them now; they are necessary for the support of our property and to prevent that property being destroyed; therefore they are required for the purposes of our undertaking." So far from being absurd, so far from being so irrational as to bring to my mind the notion of mala fides, it appears to me to be quite rational, quite reasonable, and quite proper. Therefore I think upon this ground also the objection taken on the part of the plaintiffs ought not to be entertained.

It appears to me, as I have said before, that the only reason given by the Vice-Chancellor is not sufficient in law to maintain the decision, and therefore that this appeal ought to be allowed.

BRETT, L. J.—In this case the railway company were in possession of the surface of land for the purposes of the railway, and it does not seem to have been questioned, however that land was obtained, that they held it properly for the purposes of their works. After-

wards they gave notice that they required to purchase certain minerals under that land of the surface of which, and of considerably more than the surface, they were the owners. It is objected that they could not give notice to take such minerals for the purpose of compulsorily purchasing them, because there is no power by which they can give a compulsory notice to purchase minerals at all. Secondly, it is said that if they have already given a notice to take the surface—to take the land, that is to say—without mentioning the minerals, they have exhausted their power of giving compulsory notice, and, therefore, cannot afterwards—having once given notice to take the land, meaning thereby all the land except the minerals under it—give a notice to take the minerals. Whether they can give a notice to take the minerals in the first instance seems to depend upon whether under the Lands Clauses Act or their private Act, in conjunction with the Lands Clauses Act, they can purchase minerals by compulsion. It is said that there are no words in the Lands Clauses Act which give them that power. If that is true with regard to railways, considering the matter under the Lands Clauses Act, then it is true of all other companies with which the Lands Clauses Act is concerned. I do not think that anybody has really disputed that the word "lands" in the Lands Clauses Act, where it is not a matter of a railway, includes the minerals under the land, so that under the Lands Clauses Act it is obvious that they can compulsorily purchase the minerals at the same time that they purchase the land, that is, if they give a compulsory notice to purchase the land, that makes a contract immediately for the purchase of the land including the minerals, and then the minerals as well as the land are valued, and they become the purchasers not only of the lands, but of the minerals as part of the land.

But then in the case of a railway, there is the 77th section of the Railways Clauses Act, and then the question is raised whether that does not take away from them the right of purchasing by compulsion minerals at all. Now it seems to me that the 77th section of the Railways Clauses Act is not an enabling section at all. It is a limiting section, or a section of limitation. It says that where a railway company gives notice to take land by compulsion, and afterwards, when that land is valued, becomes the purchaser of that land, that is a compulsory purchaser; unless the same should have been expressly purchased, the minerals do not pass by a notice to take the land, and by a conveyance of the land after it is valued. But it seems to me by implication to admit and to acknowledge that if at the time when they give notice to take the land they expressly give notice to take the minerals, then the minerals must be valued with the land just as in all other cases, and they take both the land and the minerals. It seems to me by implication to assume that.

But then it is said although they may do that by agreement yet

they cannot do it compulsorily, that is to say, the words "expressly purchased" exclude the idea of a compulsory purchase. In saying that they are "expressly purchased," there is nothing to say they may not be compulsorily purchased equally expressly. In other words, when you give the notice to take the land, if in the notice you expressly mention that you mean to take the minerals also, then there is nothing to say that that is not a purchase; it is a compulsory purchase, and besides that, it is an express purchase. But even that will not do, because the company must take care, as it seems to me, to see not only that they have given the notice expressly, but that when they take the conveyance, the conveyance must expressly mention the minerals also. But if they do, it is no objection with regard to that section that all that has been done compulsorily. It follows from that, that if they give express notice that they mean to take the minerals, at the time they give the notice to take the surface, or, for it is really not the surface, to take all the land down to the centre, except the minerals, if at the same time they give express notice of their intention to take the minerals also, they may do that by compulsion just as well as by agreement.

Then comes the point upon which the Vice-Chancellor seems to have decided the case, that if they have given their original notice to take by compulsion all the land except the minerals contained in it, and have taken that land without saying anything about the minerals, then they have exhausted their power with regard to that land and with regard to the minerals, and they cannot give a notice to take the minerals. Now the result of such a decision seems to me almost to show that it could not have been intended, because if that be so you must go this length, that if the railway company has once taken all the land except the minerals contained in it, however absolutely necessary it may be for their safety and for their works that they should be able to touch those minerals and to deal with them, they never can do it except by agreement with the landowner. Why should that be? Why should they not have the same power with regard to that part of the land which is excepted from their first notice as they have with regard to one part of the surface property with which they have not dealt at the time when they gave the compulsory notice as to another part; or, in other words, why should they not have the same power of going down vertically as they have if they spread out laterally? I can see nothing to prevent it. For that purpose that portion of the land which is called minerals is separated from that portion of the land which is not called minerals, and it is true that the minerals there dealt with are below one part and above another part, but separated from it. Those minerals are still land within the Lands Clauses Act, and if they give the notice to take that portion of the land which is called minerals within the limited time for exercising their compulsory power, I can see no reason why they are not to do that, assuming it

to be requisite for the purpose of the works, because they have taken the other part of the land already by compulsion which is above those minerals and which is below those minerals.

The 78th section was also relied upon, and it was said that having once taken all the land except the minerals they could not give any notice with regard to the minerals, and could not deal with them otherwise than according to the 78th section. But the 78th section applies not only during the time limited for the railway to exercise its compulsory powers, but afterwards. That 78th section applies at all times. It not only applies to the working of minerals under the land where the railway company are already owners of the surface of that land, but to the working of minerals in a man's own land near the railway. Under the 78th section after the compensation has been paid by the railway company the minerals do not belong to the railway company. They continue to be the property of the landowner. The railway company cannot touch the minerals. If all they have done is to pay the compensation under sec. 78, they cannot touch them. It is true that the landowner to whom those very minerals belong cannot touch them, and it is because he cannot touch them that compensation is given to him, but the property in them remains in him. The 78th section therefore would not meet the case which is now under consideration, where the railway having already bought the surface really require the minerals for the purpose of their railway. It was suggested that that never could be so; that they never could want those minerals; that as long as the minerals remained in the land it was impossible that the railway company could want them. But I think it has been shown that they might want to use them, that they might want to take them out for the purpose of giving increased support to their railway. They may want to use the space occupied by those minerals for the purpose of culverts or otherwise. I agree entirely with the suggestion which was made by Lord Justice Holker that they might be under the fair impression that they ought to have them left alone for the purpose of the safety of their works which might be in existence or the works which they intended to construct, and that therefore it is impossible to say they may not bona fide want to use the space occupied by minerals, and that if they do they must purchase them, and it would not be sufficient for their safety, or for any reasonable mode of dealing with their power, to say that all they possibly want with the space occupied by minerals is that the minerals should remain as they are.

Then the only remaining question is the one which Mr. Archibald, I think, almost by the course of his argument practically, substantially, and argumentatively admitted was the only point that could be really raised in this case, which was, assuming that if they did bona fide want the space occupied by the minerals for use they could purchase them, and that they could purchase them after

having already purchased the surface without them; he says they are bound to show they want that space occupied by the minerals, and they must show that it is absolutely necessary for them, whereas he says their affidavits do not show it. Now, I cannot think that "required" means "absolutely necessary." "Required" means where the company bona fide think that they are desirable, and are bona fide of opinion that they are desirable. I think those cases of the Stockton and Darlington Ry. Co. *v.* Brown, 9 H. L. C., 256, and Kemp *v.* South Eastern Ry. Co., Law Rep. 7 Ch. 364, both of which intended to law down precisely the same doctrine (for the Lord Chancellor in Kemp *v.* South Eastern Ry. Co. says it would be wrong to derogate in any way from the principle laid down in the Stockton and Darlington Ry. Co.'s Case), really meant this, that the opinion of the railway authorities is to be the governing matter as to whether the things are for the advantage of the railway, if that opinion is an opinion bona fide expressed and bona fide laid before the Court. That seems to me to be the meaning of it. If, for instance, all that they had said in this case had been what Mr. Baxter unhappily said in the last paragraph of the affidavit I should have had some doubt. But where his engineer says that it is wanted for the purposes of the railway and where Mr. Baxter's own affidavit says the same thing —though, begging his pardon, it was not wanted at all, because whether he said it or not is wholly immaterial; it is what the engineer says which is the important point—where the engineer says that he wants it, unless you can show that that is an assertion made malâ fide it is binding upon the court. And how could you show that it was made malâ fide? If you could show that it was palpably on the face of it absurd, as in the case put by the Lord Chancellor—if the railway engineer were to say, "We want to build a station which shall be according to a plan which we now give you notice of, which would really occupy half an acre, nevertheless I require you to sell me 200 acres," then as to all but the half acre it would clearly be shown to be so unreasonable that it could not be bonâ fide asked for the purposes of the railway. Of course there are a thousand other cases in which it might appear from the affidavit of the engineer, or from the very requisition, that what he was asking for was so wholly absurd that his requirement must be unreasonable, and then in such a case you would naturally say, "It is not merely because you ask for a thing that you are to have it, because it is apparent that your request is not bonâ fide." But here there is nothing to show that. It seems to me that the affidavit of the engineer is quite consistent with reason and with a reasonable probability that these minerals are wanted to be purchased for the safety of the works, and if it is obvious that if these minerals are left in the hands of the owner with a right to work them the only way he could work them would be by en-

dangering the surface or using the surface, then it is palpable that it is really for the safety of the works that the company should purchase these minerals.

Therefore, I think, in this case we must disagree with the judgment of the Vice-Chancellor, and disagree with the reasons he has given in support of his judgment.

HOLKER, L. J.—The most important question which has been raised in this case is this, whether the railway company during the time limited by the Act of Parliament can take by compulsion the land described within the limits of deviation, and not only the surface of the land but the minerals underneath. Upon that point I had, I confess, at first some doubt, but that doubt has been entirely removed during the course of the arguments which have been presented to the court. It seems to be clear that if the railway company in this case or in any other were acting merely under the powers of the Lands Clauses Consolidation Act for the taking of lands, they would be entitled to take both surface and minerals compulsorily, because under that Act, or by that Act, the word "land" is to include minerals, and by the Act they are expressly authorized to take the lands. Therefore, if it stood there and there was nothing more, I think it would be beyond all controversy, as my Lord has pointed out, that the railway company might take both the land and the minerals. One may imagine a very good reason why a railway company should not be excluded from the power of taking the minerals. It may be that near a railway station there is a thick bed of clay, or there may be a stratum of minerals, which would very materially interfere with their operations unless they could take it at once, and it may be that there are some minerals under the land which the railway company will traverse by means of their railway which would be of advantage to them, and which if they could take at the outset they could get at a very small, or comparatively small, price; but if they have to wait for a considerable time until the mining operations had been carried on, they would have to pay a very heavy price for. Therefore one can imagine reasons why it may be of great advantage to the company to be able to take the minerals along with the surface.

Then it being conceded, or it being clear almost to demonstration, that if the Lands Clauses Act had been the prevailing Act, and the company had acted upon its provisions alone they could have taken the minerals along with the surface, then comes the question, have they been restricted from so doing, or prevented from so doing, by any legislation? and then the 77th section of the Railways Clauses Consolidation Act, 1845, is referred to. The 77th section provides in effect that the company shall not be entitled to any mines of coal, ironstone, slate, or other minerals, under any

land purchased by them (it does not confine it to a particular kind of purchase), except such part as may be necessary for their works, unless the same shall have been expressly purchased, and all such mines, excepting as aforesaid, shall be deemed to be excepted out of the conveyance of such lands, unless they shall have been expressly named therein and conveyed thereby. Therefore, according to this section, the minerals will not pass unless they have been expressly purchased. Now the real question is, what is the meaning of "expressly purchased"? I cannot see upon consideration any reason to confine "expressly purchased" to "purchased by agreement." The words are just as apt to describe a purchase under compulsory powers as they are to describe a purchase by agreement. Then, if you come to look at the good sense of the thing, it is pretty obvious, indeed it is quite clear to my mind, that the section was introduced into the Act of Parliament by the Legislature for the benefit not of the landowner or the mine-owner, but of the railway company, because it might be a most disastrous and disadvantageous thing for the railway company to be obliged at once to purchase mines which it never would require for any purpose of the railway. For this reason, and having that result in view, I think the Legislature introduced this section for the very purpose of protecting and benefiting the railway company.

As to the other points which have been dealt with by my Lord, I have nothing more to add.

ADDENDA.

BEING A STATEMENT OF POINTS DECIDED IN CASES NOT REPORTED.

In an action against a railroad company for killing a cow, there was evidence to show that the cow was found beside the defendant's track, torn and mutilated, and that there was blood and cow's hair on the track near by. *Held*, sufficient to warrant the court in submitting to the jury the question how the animal came to her death.

If the verdict is warranted by the evidence, this court will not reverse because the trial court incorrectly declared the rule of damages.

The order of argument is a matter to be regulated by rule of court. Where plaintiff's counsel, being entitled to make the opening address to the jury, declines to do so, it will not be error of which the defendant can complain if the court refuses to allow his counsel to close.

It is not necessary to recovery, in an action for the killing of stock founded on the 43d section of the railroad law, (R. S., § 809,) to show that three months have elapsed since the completion of the road at the place where the killing occurred. Blewett *v.* Wyandotte R. R. Co., 72 Mo. 583.

In an action under the railroad stock-killing law of 1874, (Comp. Laws of 1879, p. 784,) it was shown that the demand, alleged to have been made by the plaintiff of the railroad company for the value of the stock alleged to have been killed, was made in writing, and only in writing. This demand was proved on the trial of the case, only by the introduction in evidence of a copy of the written demand; and this was done over the objections of the defendant, but by the permission of the court, without any foundation for the introduction of secondary evidence having first been laid. *Held*, Error.

In this same action, the defendant railroad company alleged in the third defence of its answer, by way of counter-claim, that the plaintiff's said stock was knowingly and intentionally permitted to run at large, and on the defendant's premises, in violation of the herd law of the State (Comp. Laws of 1879, p. 933, et seq.), whereby the defendant's train was wrecked, and great damage was

[illegible] The defendant did not admit that [illegible] negligence, its pleadings did not [illegible] in its answer all allegations of the [illegible] fault or negligence. *Held*, That said [illegible] merely because it failed to allege [illegible] free from all fault and negligence. [illegible] negligence is matter to be shown by the [illegible] U. P. R. R. Co. *v.* Walters, 24 Kan. [illegible]

[illegible] the duty of a railroad company to fence against [illegible] as against animals in adjoining fields or [illegible] highway crossings are necessary, to [illegible] highway on to the railroad track.

[illegible] animals went on the railroad track [illegible] highway, and were killed some distance from [illegible] company would not be liable upon the [illegible] a fence, were properly refused.

[illegible] accordance with the evidence, no [illegible] because a charge given to the jury [illegible] evidence. Evansville, etc., R. R. Co. *v.* [illegible]

A railway company is not liable under the statute for interest on [illegible] killed by their locomotives or cars. The [illegible] at the time of the killing is the [illegible] under the statute. Houston, etc., R. R. Co. *v.* [illegible]

[illegible] relating to show a demand for the killing of [illegible] chapter 94 of the Laws of 1874, is [illegible] evidence is given on the trial to sustain [illegible] of the trial court that a demand was made [illegible]

[illegible] company is not guilty of negligence in failing [illegible] from swine in a township where they are not [illegible] at large, and it appears from an agreed statement [illegible] was killed by the negligence of the railroad [illegible] such township, and it further appears that the negligence [illegible] owner in permitting the animal to run at large, in [illegible] § 46, ch. 105, Comp. Laws 1879, contributed directly [illegible] *Held*, the negligence of the defendant was offset by [illegible] of the plaintiff, and the owner of the animal could not recover for his loss.

The provisions of § 1, ch. 93, Laws of 1870, (§ 28, ch. 84, p. 784, [illegible] Laws 1879,) have not wiped out contributory negligence as [illegible] in actions against railroad companies for damages to person [illegible] property, resulting from negligence on the part of such

companies. Kansas City, etc., R. R. Co. *v.* McHenry, 24 Kansas 501.

Plaintiff was the owner of a quarter-section of land, through which ran the defendant's railroad. The quarter-section as a whole was inclosed with a legal fence, but there was no fence along the defendant's road separating the right of way from the rest of the quarter-section. The plaintiff turned his animal loose in this quarter-section, and during the night-time it was injured by the defendant's cars. The night herd law was in force in the township in which the land was situate. *Held*, That while the plaintiff may be said to have confined his animal within the meaning of the statute as to all parties except the defendant, an owner of part of the premises within the inclosure, he cannot be held to have so confined it as to the defendant, and hence, there being no negligence on the part of the defendant, except in not having a fence along its right of way, he cannot recover for the injury. The obligation of the plaintiff to confine his animal, and that of the railroad to fence its right of way, are of equal force, and he who disregards the one cannot recover of the other for injuries resulting alone from their concurrent disregard of statute obligations. Kansas Pacific R. R. Co. *v.* Landis, 24 Kansas, 406.

In an action for double damages for killing stock at a point where a railroad company is obliged to fence its road, service of the statutory affidavit and notice must clearly appear. Evidence of service of such affidavit and notice, in this case, *held* insufficient. The fireman of the engine killing the stock testified that it occurred at a public crossing. *Held*, it was proper cross-examination to inquire of him as to the speed of the train at the time. The jury were instructed that the company had a right to fence its track except at public crossings. *Held*, that the fact that the instruction did not except depot and station grounds, the accident occurring away from a station, was simply error without prejudice. Verdict held not against evidence. Keyser *v.* Kansas City, etc., R. R., 9 N. W. R., 338.

In 1874, the legislature passed a law requiring railroad companies to fence their roads, or be liable for stock killed by their trains. The defendant corporation was then in existence. In 1876 its property was passed into the hands of a receiver, duly appointed. In 1879 the receiver was discharged, and the property returned to the possession of the corporation. Just before this was done, and while the possession of the receiver continued stock belonging to plaintiffs was killed by the railroad trains, at a place where the road was unfenced, and where it might have been fenced. *Held*. That an action might be main-

tained against the corporation for the enforcement of the liability imposed on it by said statute.

Where the testimony is not preserved, and the bill of particulars alleges, and the findings show, in general terms, that the road was unfenced, and yet could have been fenced at the place where the stock was killed, and nothing appears as to the condition of fencing at any other place, or as to where the stock went upon the track, *held*, sufficient in this respect to sustain the judgment against the corporation.

No attorney-fees can be allowed for defending in this court a proceeding in error to review a judgment rendered under said law of 1874. Kansas Pacific R. R. Co. *v.* Wood, 24 Kan. 619.

Where in an action under the stock law of 1874 to recover damages for the killing of a horse by the train of defendant, the case coming to this court upon simply the findings of fact and without any of the testimony, the findings read, "That said plaintiff then resided about three quarters of a mile from the railroad of the defendant in the county of D. and State of Kansas, and about two and one half miles north of Baldwin City in said county and State," and then state the circumstances of the injury, which took place as he was riding toward a spring on the opposite side of the railroad and about seventy-five yards therefrom, *held*, that a general conclusion and judgment in favor of the plaintiff will not be reversed on the ground that it does not appear that the animal was killed in the county of D.

Where by any fair although not the most obvious construction of the language of the findings, any fact, especially a fact of minor importance, is shown, it will in the absence of the testimony be sufficient to sustain the judgment.

Contributory negligence is matter of defence; and *held*, that upon the facts as stated in the findings there is not such a showing of contributory negligence as will justify a reversal of the conclusion and judgment of the trial court. Kansas City, etc., R. R. Co. *v.* Phillibert, 25 Kan. 582.

In an action brought before a justice of the peace, by P. against a railway company, to recover damages under the railroad stock-killing law of 1874, (Comp. Laws of 1879, p. 784), for the killing of a colt, the plaintiff recovered a judgment before the justice of the peace, and the defendant appealed to the district court, where the plaintiff, with leave of the court, and full notice to the defendant, amended his bill of particulars so as to make it allege (which it did not do before) that the plaintiff, more than thirty days before the commencement of his action, demanded of the defendant the full value of the colt, and that the defendant failed and refused to pay anything therefor. *Held*, that the court below did not err in permitting the plaintiff to make such amendment.

Also, in said case the plaintiff alleged in his original bill of particulars that "said colt was injured and killed by said defendant at a place where said road-bed and railway were not fenced, but ought to have been fenced, as required by law, to keep stock from crossing on, over, along and near the railroad and bed of the defendant; and that said animal was not injured and killed at or near any public road or crossing." *Held*, Under the circumstances of this case, that said allegation is sufficient with regard to alleging the want of a sufficient fence. Missouri Pacific R. R. Co. *v.* Piper, 26 Kan. 58.

The owner of cattle killed at a public crossing of a railroad through the negligence of the company's servants, cannot recover in an action based on the 43d section of the railroad law; an instruction submitting the question of negligence in case the jury should find that the killing occurred at such a crossing is, therefore, properly refused, even when asked by the defendant.

Positive evidence should have more weight than the negative evidence of persons having no special facilities for knowing the fact. Sullivan *v.* Hannibal, etc., R. R. Co., 72 Mo. 195.

Railway companies are at least liable to occupants as well as to owners of adjoining lands, whose cattle are injured upon railway tracks, in consequence of a neglect of the companies to fence. Section 1810, Rev. St. [And it would seem that they are liable to all persons whose cattle are injured through such neglect. Laude *v.* C. & N. W. Ry. Co., 33 Wis. 640.]

The mere opinion of a witness upon the question whether a certain bank of earth between defendant's track and land occupied by the plaintiff was "as good a protection against cattle as a fence four and a half feet high," is admissible.

Section 1810, Rev. St., provides that no fence shall be required in places "where the proximity of ponds, . . . hills, embankments, or other sufficient protection renders a fence unnecessary to protect cattle from straying" upon a railroad track. *Held*, that the fact that cattle have, in fact, in a given instance, surmounted an embankment and gotten upon the track, is conclusive that such embankment was not a "sufficient protection."

An error in ruling out testimony is cured where the witness afterwards testifies fully upon the subject.

There was no error in submitting the question of plaintiff's contributory negligence to the jury upon all the evidence, and refusing to instruct them that facts contained in certain hypothetical statements prepared by defendant's counsel, and supposed to conform to the proofs, would show such contributory negligence. Veerhusen *v.* C. & N. W. Ry. Co., 53 Wis. 689.

After proof that a cow had been killed by a railroad train, the

Where the plaintiff, who held income bonds of the Union Pacific R. R. Co., eastern division, the coupons of which were payable out of "net earnings" on the first of March and September in each year, brought an equity suit in March, 1880, claiming an account of net earnings by reason of a default on March 1, 1880, and thereafter brought suit at law to recover coupons on other bonds of the same issue held by him, but not included in the equity suits, for defaults arising September 1, 1880, March 1 and September 1, 1881, and March 1, 1882, *held*, that plaintiff was entitled to an account in the equity suit; not merely for net earnings prior to the commencement of such equity suit to pay the coupons then due, but also for all coupons due and net earnings received after the commencement of the suit until the accounts were stated, and afterwards on the foot of the decree in the equity suit, and that the lawsuits could all be stayed without prejudice to plaintiff, as all his rights hereafter to recover could be protected in the equity suit. Morgan *v.* Union Pac. R. R. Co., C. C., S. D. N. Y., 11 Fed. Rep. 693.

A statute of a State authorized commissioners, appointed for a town, to borrow money and execute bonds for the town in aid of a railroad company, and provided that they should exercise their authority only upon the condition that the assent of a majority of the taxables should be obtained, which should be proved by the affidavit of one of the assessors of the town. The statute made it the duty of the assessors to make such affidavit when the requisite assents should have been obtained. *Held*, that bona fide purchasers of the bonds are not required to show that the requisite number of taxables assented to their issue, as the affidavit of the assessor is conclusive in their favor; and that the decision of the highest court of the State to the contrary, if rendered after the rights of such purchasers were acquired, is not binding upon a circuit court of the United States. McCall *v.* Town of Hancock, 10 Fed. Rep. 8.

A petition was presented to a board of county commissioners under the act of May 12th, 1869, before it was amended by the act of March 17th, 1875, praying the board to order an election upon a proposed appropriation by a township, to aid in the construction of a railroad by a railroad company named, "a corporation under the laws of the State of Indiana, now owned by and forming a part of" another railroad company named, "a corporation under the laws of the State of Illinois; . . . and that said appropriation," naming the amount, "be levied by taxation on and from said . township . and invested in the capital stock of said company," for the benefit of the township and taxpayers. The petition having been granted and notice given of the election, the appropri-

ation voted and the tax levied, a taxpayer brought an action to enjoin its collection.

Held, that the petition sufficiently shows such company to have been one organized under the laws of Indiana.

Held, also, inasmuch as the answer denied the ownership of such company by a foreign company, that the petition was not vitiated by its statement of such ownership.

Held, also, that, under the original act, the township had a right to vote upon the proposition to make an appropriation by taking stock.

The fact that such petition asks that the tax to be levied shall be paid to the proper railroad company named, "or its assigns," does not invalidate the petition.

The notice of such election stated that the question to be voted upon was that of voting an appropriation to aid in constructing such railroad, naming it, "by taking stock in the company constructing said railroad."

Held, that the railroad company named was meant by the words "company constructing," etc.

The fact that the levy made to raise the tax voted will raise an amount slightly in excess of the amount voted will not invalidate the tax, and will not relieve the plaintiff from the general rule, that he must first have paid or tendered the amount legally levied.

Where, upon the voting of such an appropriation, the board of commissioners order a tax to be levied, they thereby determine judicially that proper notice of such election has been given, and such fact cannot be questioned in an action to enjoin the collection of the tax. If there was not proper notice, the taxpayers' remedy was by appeal from the order of the board. Paris Treasurer *v.* Renolds, 70 Ind. 360.

Common carriers have the power to make reasonable regulations for the transporting of their passengers from point to point. Whether they may classify passengers according to sex and color not decided.

A colored lady who had purchased and held a first-class ticket was entitled to admission into the ladies' car, if there was room for her therein; and, if she was refused admission and the railroad company declined to carry her except in the smoking-car, containing only men, some of whom were smoking, she had the right to decline to accept such accommodations, and it is liable to her in damages.

Carriers are bound to provide for colored passengers, holding first-class tickets, accommodations precisely equal in all respects to those provided for white passengers holding similar tickets.

The general tendency of courts and text writers of the present age is to embrace all kinds of damages under the head of com-

[illegible] damages, except in cases of fraud or insult, in which cases [illegible] and punitive damages may be awarded.

In an action against a railroad company to recover damages for [illegible] exclusion from its cars, in which it appeared that the [illegible] a colored lady, purchased and held a first-class ticket at the time she applied for admission to the ladies' car; that she was [illegible] in appearance and conduct, and was at the time carrying a sick child in her arms; and that the company refused to carry her except in the smoking-car, in which were men only, some of whom were smoking; whereupon she left the cars; *held*, that she was entitled to such damages as would make her whole, and the jury should consider the loss of time and inconvenience she had been put to, and the proper amount of expenses incurred in the vindication of her rights. Gray *v.* Cincinnati Southern R. Co., U. S. C. C., S. D. Ohio, W. D., 11 Fed. Rep. 683.

Each carrier on a through bill of lading is liable only as respects its own line, in the absence of a different understanding.

Where a carrier operating a line between Antwerp and Philadelphia issued a through bill of lading from Antwerp to Boston, acknowledging that the goods were to be transported to Philadelphia by steamer, and from thence to Boston, either by water or rail, and that the responsibility of each carrier should be limited to each line, it is held that it was not liable for injury to the goods on board of lighters which it had employed to transport the goods three miles by water from its wharf in Philadelphia to the wharf in the same city, of a steamship line to Boston.

The employment of the lighters in such case *held* to be not ordinary lighterage service, but a carriage by water over a necessary part of the route to Boston. Harding *v.* International Nav. Co., U. S. C. C., E. D. Penn., 12 Fed. Rep. 168.

Where a railroad company issues a ticket entitling the holder to a passage over its own and connecting lines to the place of destination mentioned in the ticket, and there is no limitation in it upon the right of the holder to transfer it to another, *held*, that upon the refusal of a connecting line to accept the ticket, and of the contracting company to furnish a local ticket over that line or the amount of money necessary to procure one, the holder has a right of action against the original contracting company for breach of contract; and this right is assignable, under the laws of the State of Colorado, so as to give a right of action to the assignee.

It is too late after verdict to object that the assignee alleged that he purchased such ticket, when the proof shows that it was bought by others, or that he failed to allege a failure on the part of the contracting company to redeem the ticket. Hudson *v.* Kansas Pacific R. R. Co., 9 Fed. Rep. 879.

Although a passenger may have the right to be carried under a

special contract, if he be not provided with a ticket the conductor can recognize, he must pay the fare demanded by the conductor, under a reasonable regulation requiring him to demand a fare of persons without tickets, and cannot insist on being expelled by force as a foundation for a suit for damages for wrongful expulsion. By this conduct he contributes to his injuries, which are the direct results of his own conduct, and not of the breach of any special contract he may have for his carriage. Hall *v.* Memphis, etc., R. R. Co., 9 Fed. Rep. 585.

A provision in a bill of lading, issued by a common carrier, to the effect that the carrier shall not be liable for loss by fire, will not exempt it from liability for a loss by fire occurring through its negligence.

Where a common carrier undertakes to transport cotton for hire upon open flat cars, it is bound to take all needful precautions for the cotton's safety and protection.

Where cotton in course of transportation by a common carrier was destroyed by fire in consequence of the carrier's gross negligence, and the owners assigned and transferred their interest in said cotton and their rights against said carrier to a fire insurance company, by which the cotton was insured, upon its indemnifying them for the loss sustained, *held*, that the insurance company was entitled, as against the carrier, to the value of the cotton at the time of the loss, with 6 per cent interest from the day upon which the cotton would probably have been delivered to the owners if it had not been destroyed. American North Insurance Co. *v.* St. Louis, etc., R. R. Co., 9 Fed. Rep. 811.

Where two or more railroads, by an arrangement between themselves, established a route to a certain point, and contract to carry a passenger over their roads to the terminal point, the terminal road is liable to him, as a common carrier, if, while being conveyed by it to his destination, he is injured, either through the negligence of its immediate employees or others with whom it has contracted for motive power or other service.

A corporation furnishing motive power to a railroad company, but not acting, or chartered to act, as a common carrier, is not bound to use more than the ordinary skill and diligence which its employment needs, and is only liable for direct negligence or unskilfulness.

Where a common carrier employs another party to furnish motive power, and through the direct negligence of the latter, a passenger, being conveyed by the carrier, is injured, and the carrier is also at fault, and the passenger brings a suit against each party, and both suits are tried together, the same amount of damages should be rendered against each. Under such circumstances the

satisfaction of the judgment in either case should be made to operate as a satisfaction in both.

A party who receives a physical injury through the negligence of another, should be allowed sufficient damages to compensate him for the amount of his expenditures and losses in consequence of the injury, taking also into consideration the extent of his injuries, his sufferings, and the effect of the accident on his general health. Keep *v.* Indianapolis, etc., R. R. Co., 9 Fed. Rep. 625.

The fact that the shipper was allowed to fill the bill of lading in his own handwriting, and leave a blank which afforded opportunity for increasing the statement of the number of bales shipped, will not render the common carrier liable for loss occasioned by the forgery of the shipper in raising the bill of lading. Lehman, Durr & Co. *v.* Central R. R. and Banking Co., U. S. C. C., M. D. Ala., 12 Fed. Rep. 595.

A carrier is not deprived of the protection afforded by the Carriers Act (11 Geo. 4 & 1 Wm. 4, c. 68), s. 1, by the fact that the loss of the goods is temporary and not permanent.

The plaintiff delivered to the defendants, who were carriers for hire from London to Rome, a trunk to be sent by rail from London to Liverpool, and thence shipped by steamer for Italy. Owing to the defendants' negligence the trunk was sent to the Victoria Docks and put on board another vessel bound for New York where it arrived, and a long time elapsed before it was restored to the plaintiff. The trunk contained articles within the Carriers Act, the value of which exceeded 10*l.*:

Held, by Lopes, J., having power to decide questions of law and fact, first, that the defendants were not deprived of the protection of the Carriers Act by the fact that the loss of the goods was temporary and not permanent; secondly, that the loss of the trunk must be taken to have occurred during its transit by land, as it was lost to the plaintiff directly it went on its wrong road to the Victoria Docks; thirdly, that the plaintiff was entitled, notwithstanding the Carriers Act, to recover as damages the cost of the re-purchase of other articles at Rome at enhanced prices in place of those temporarily lost, as this was not damage for the loss, but for something consequential to it, and the damage was not too remote, for it was a reasonable and necessary act for a person in the position of the plaintiff to buy these articles in Rome. Millen *v.* Brash & Co. L. R., 8 Q. B. D. 35.

When goods are sent, not according to the contract with the owner, but by some other route, there is no lien for freight money; and if the goods are withheld under a claim of lien, an action of trover will lie for their value.

Where household goods, more or less used, were transported by

railroad to a distant place and there converted, *held*, that the owner was a competent witness to the point of their value, as such goods have no established market price, and the rule that the market value at the place of conversion is the true measure of damages is therefore inapplicable. Marsh *v.* Union Pacific R. R. Co., 9 Fed. Rep. 873.

A failure to discuss an assignment of error is a waiver thereof.

In an action against a railway company for injury to stock shipped on the company's cars, the company answered as follows: "That the plaintiff received the stock from the defendant in good condition, and paid the freight thereon, and gave defendant no notice that said stock was not delivered to him in good order, and made no demand for any damages on account of any injuries, or supposed injuries, to said stock."

Held on demurrer, that the answer was not good in confession and avoidance, and at best could be deemed only an argumentative denial.

It is not error to wrongfully sustain a demurrer to a paragraph of an answer, if the facts averred could have been proved under another paragraph.

Unless the bill of exceptions states that it contains all the evidence given on the trial, the Supreme Court will not consider the question of the sufficiency of the evidence to sustain the verdict.

If the instructions given were correct under any supposable state of the evidence, under the issues, the evidence not being in the record, the case will not be reversed. Ohio, etc., R. R. Co. *v.* Nickless, 73 Ind. 301.

To entitle one to recover under chapter 68, Laws of the Fifteenth General Assembly of Iowa, for discrimination in rates for the carriage of goods, it must appear that the discrimination was made for a like service and under "like conditions" in all material respects, and the burden of proof is upon the plaintiff claiming damages under such chapter for such discriminations to show that the conditions of the shipments were like. Paxton *v.* Illinois, etc., R. R. Co., 9 N. W. Repr. 334.

The penalty imposed by s. 103 of the Railways Clauses Consolidation Act (8 Vict. c. 20), for travelling in a railway carriage without having paid the fare and with intent to avoid the payment of it, is not "a sum of money claimed to be due and recoverable on complaint to a court of summary jurisdiction" within the meaning of s. 6 of the Summary Jurisdiction Act, 1879 (42 and 43 Vict. c. 49), and is not subject to the procedure for the recovery of civil debts in a court of summary jurisdiction prescribed by s. 35 of the same Act. Reg. *v.* Paget, L. R. 8 Q. B. D. 151.

Railroad companies, as carriers of passengers, must apply to the

boiler of a locomotive used by them in hauling passenger trains every test recognized as necessary by experts; but they are not liable for defects which cannot be discovered by such tests.

The testimony of unimpeached witnesses who testify positively to facts which are uncontradicted overcomes a mere presumption, but a verdict will not be set aside on this ground, unless the court its satisfied that the jury were controlled by their prejudices rather than by their impartial judgment. Robinson *v.* N. Y., etc., R. R. Co., 9 Fed. Rep. 877.

A railroad company, in the execution of its contract with the government, carried the mails from P. to F., the route being partly over its own road and partly over a portion of the road of company B., which also had a contract for carrying the mails over its entire line. After the passage of the act of March 3, 1873, c. 231, the Post-Office Department made frequent adjustments of the amount due to the respective companies, which was from time to time received without protest or objection. B. having received the amount due for conveying all the mails over its road, although over a part of it a portion of them had been carried by A. under its contract, the latter brought suit against the United States to recover compensation for the portion so carried. *Held*, that A.'s acquiescence in the adjustments precluded the maintenance of the suit. Railroad Co. *v.* United States, 103 U. S. 703.

The freight agent of a railroad company, by the procurement of a cotton buyer, signed a bill of lading for 32 bales of cotton which were not on hand, and were never delivered to the railroad company or any agent for it. The plaintiffs paid a draft for the price of the cotton on the faith of the bill of lading attached to it and indorsed to them, and never having received the cotton sued the railroad company for its non-delivery. *Held*, that the carrier was not estopped to show that no cotton was in fact delivered for transportation; that the agent had no authority, real or apparent, to sign a receipt or bill of lading until actual delivery of the cotton, and the company was not liable.

Neither a general or local custom to use bills of lading as collateral security for drafts drawn against the merchandise can alter the rules of law governing the contract of the parties. This use of bills of lading is one in which the carrier has no interest, and he cannot be charged with an extraordinary liability dehors the contract for which he receives no compensation or indemnity, merely to assure other parties against loss by the fraudulent dealings of those who so use them. It is not in the interest of commerce to impose this liability upon the common carriers of the country.

The indorsee of a bill of lading for value may not only sue for the goods, but he may, in his own name, sue the carrier for non-

delivery. Bills of lading are quasi negotiable to that extent, and particularly so under the Tennessee Code, § 1967. Robinson *v.* Memphis, etc., R. R. Co., 9 Fed. Rep. 129.

The fact that a consignee does not reside at the point where goods are to be delivered, and does not expect to be there to receive them, will not authorize the carrier to deliver them to a general agent of the consignor resident there.

It is not essential that an instruction which undertakes to define the principal rule of liability in a case, shall state all the exceptions to the rule which may arise under the pleadings and evidence. If these are correctly stated in one or more separate instructions, it is sufficient.

The defence to an action by a consignor against the carrier for the conversion of certain sewing machines which had been consigned to K at M, was in substance, that K did not live at M, and did not expect to be there to receive the machines; that it was understood between plaintiff and defendant that on arrival at M they were to be delivered to B & S, who were plaintiff's agents and dealt in sewing machines of plaintiff's manufacture at M, and that they were so delivered. Among the evidence offered by defendant was testimony tending to show that B & S had obtained the machines by representing to defendant's agents that they were intended for them. For the plaintiff the court instructed the jury, in substance, that defendant was bound to deliver the machines to K, and that the mere fact that B & S had made such representations and had thus obtained the machines, was no defence, if the representations were untrue in fact; and further instructed that the fact that K was not and did not intend to be at M, did not of itself justify defendant in delivering the machines to B & S. For defendant the court instructed, in substance, that if they found that the understanding alleged in the answer existed, their verdict should be for defendant. *Held*, that these instructions, taken together, put the case fairly before the jury. Wilson Sewing M. Co. *v.* Louisville, etc., R. R. Co., 71 Mo. 203.

Discriminations in the rates of freight charged by a railroad company to shippers, based solely on the amount of freight shipped, without reference to any conditions tending to decrease the cost of transportation, are discriminations in favor of capital, are contrary to sound public policy, violative of that equality of rights guaranteed to every citizen, and a wrong to the disfavored party, for which he is entitled to recover from the railroad company the amount of freight paid by him in excess of the rates accorded by it to his most favored competitor, with interest on such sum.

Nicholson *v.* G. W. R. Co. 5 C. B. (N. S.) 436, distinguished.

The plaintiffs were engaged in mining coal at Salineville, Ohio, for sale in the Cleveland market. They were wholly dependent

on the defendant for transportation. The regular tariff between those points was $1.60 per ton, with a rebate of from 30 to 70 cents per ton to persons shipping over 5,000 tons during a year; the amount of rebate being graduated according to the quantity shipped. Under this schedule plaintiffs were required to pay higher rates on the coal shipped by them than were exacted from other and rival parties, who shipped larger quantities. The defendant claimed that the discriminations were made in good faith, to stimulate production and increase its tonnage, and were within the discretion confided by law to every common carrier. In an action to recover back the excess of tariff paid by plaintiffs, *held*, that such discriminations were illegal, and that plaintiffs were entitled to recover the amount paid by them in excess of the rate accorded to their most favored competitor, with interest thereon. Hays *v.* The Pennsylvania Co., U. S. C. C., N. D. Ohio, 12 Fed. Rep. 309.

The act of the Tennessee legislature entitled "An act to incorporate the Louisville and Nashville R. R. Co." was simply the grant of a license or right of way to that company to construct its railroad into the state of Tennessee, under its charter granted by the state of Kentucky, and it did not create a new corporation of that name in Tennessee.

Railroad Co. *v.* Harris, 12 Wall. 66, cited and followed.

The fact that the Louisville and Nashville R. R. Co., a corporation of Kentucky, leased and was operating a railroad chartered by Tennessee, and upon which the accident occurred, did not make that company a citizen of Tennessee, nor prevent it from removing a case to the federal court when sued in a state court of Tennessee.

Though corporations should be held to a high degree of care in favor of the public, this can only be done by requiring each individual employee of the corporation to perform his duty diligently; and where such employee receives an injury which is the proximate result of his own negligence it would be contrary to public policy to allow him to recover damages against the company. Callahan *v.* Louisville and Nashville R. Co., U. S. C. C., M. D. Tenn., 11 Fed. Rep. 536.

When the limits of two congressional railroad land grants made in the same act overlap, and there is no express priority in the disposition of such lands, or provision for the same, *held*, that each of the two railroads is entitled to an undivided half of the land. Chicago, Milwaukee and St. Paul Ry. Co. *v.* Sioux City and St. Paul R. Co. and others, 10 Fed. Rep. 435.

By the Act of Congress of July 1st, 1862, entitled "An Act to aid in the construction of a railroad, etc.," the timber growing on

the odd-numbered sections of public mineral land of the United States was granted to the Central Pacific R. R. Co. of California; and under the term timber is included all trees and wood. *Held*, accordingly, that a subsequent patentee of such lands took no title to the timber. Carr *v.* Central Pacific R. R. Co., 55 Cal. 192.

The Railway Commissioners have no jurisdiction under the Regulation of Railways Act, 1873, s. 28, to order a railway company, in whose favor they have decided upon an application to them against such company, to pay costs to the unsuccessful applicant.

Judgment of the Queen's Bench Division reversed. In the matter of the application of Foster and another *v.* Great Western Ry. Co., L. R. 8 Q. B. D. 515.

The complaint alleged that the plaintiffs entered into a contract with the S. and M. R. R. Co. (afterward merged into and consolidated with the defendant) for the construction of a tunnel—the contract price to be paid upon estimates of the chief engineer; and that the engineer, by collusion with the company, and for the purpose of defrauding the plaintiffs, omitted certain work from his estimates. Upon the trial the plaintiffs offered to prove that they did extra work, on the promise of the engineer (subsequently ratified by the president of the company), that they should be paid for it, as for similar work under the contract. *Held*, that as the plaintiffs had not sued for extra work, but for work done under the original contract, the evidence was not admissible.

The court in effect instructed the jury that, if the estimates of the chief engineer were honestly made, they were conclusive, but the bill of exceptions did not contain the contract, or any of the evidence to which the instruction related. *Held*, that it could not be said that there was any error in the ruling.

A witness, with a view to impeach him, was asked certain questions (stated below), affecting his moral character. *Held*, that they were rightly ruled out. Hinkle *v.* San Francisco, etc., R. R. Co., 53 Cal. 627.

If the final decree of a single justice of this court, sitting in equity, is appealed from, without a report of the evidence upon which the decree was made, the only question upon the appeal is whether the decree is warranted by the allegations of the bill.

If a corporation issues a certificate of stock to a person as trustee, and, on his death, at the request of a person claiming to be entitled to the stock, refuses to examine the evidence offered and to permit a transfer, without a decree of court, it may, on a bill in equity against it to compel a transfer, if it appears that it could easily have satisfied itself of the truth of the facts, be ordered to pay costs as well as to make the transfer. Iasigi, adm., *v.* Chicago R. R. Co., 129 Mass. Repts. 46.

Where a corporation, organized under the General Railroad Act (ch. 140, Laws of 1850), leases a portion of the route covered by its franchise to another corporation, with the right to lay tracks thereon, not for the purpose of constructing the road of the lessor, but to enable the lessee to complete its own road, the tracks, when built, not to belong to the lessor or to be operated by it, but to be constructed at the expense of and to be operated and maintained for the use of the lessee exclusively, this is not such a user by the lessor of its franchise as is contemplated by its charter; and in determining the question whether the corporate existence and powers of the lessor have ceased because of failure to begin the construction of its road and to expend thereon ten per cent of the amount of its capital within five years after filing its articles of association, as prescribed by the act of 1867 (ch. 775, Laws of 1867), the construction and expenditure by the lessee upon the portion of the route so demised cannot be taken into consideration.

Such a corporation cannot retain its corporate existence, without the expenditure so required, by granting to another company the privilege of laying tracks over such parts of its route as the other company may desire to use.

A reservation in such a lease of a right in the lessor to run cars over a portion of the tracks laid by the lessee, on payment of a sum specified for such use, does not avail to give the lessor the benefit of the expenditures by the lessee.

As to whether such a lease is valid, quære. In the matter of the Brooklyn, etc., R. R. Co., 81 N. Y. 61.

Act 89 of 1875, in making valid the conveyances of corporations made in good faith though not according to law, does not make them presumptive evidence of the rightful character of the sale. A deed in proper form and a sale in good faith for value must be clearly proven.

Execution purchasers of real estate can sue as if they were absolute owners for any injury done the property (Comp. L. §§ 4657–8) as for timber wrongfully severed from the freehold.

Where the same person owns a parcel of land, in part by original title and in part by purchase under an execution, and sues for the removal of timber, he is not bound to show from which portion the timber was taken. Marquette, etc., R. R. Co. *v.* Atkinson, 44 Mich. 165.

Where a corporation is organized under the laws of one State it becomes a citizen of that State, although the same persons, by the same corporate name, have been incorporated with the same powers and the same objects by another State. Such an act of incorporation must be construed as only a license enlarging the field of its operations, and it does not constitute it a corporation of that State, but shorn of none of its qualities as a corporation of the

State under which it is organized. It is privileged to elect to sue in the United States courts.

Article 1, § 10, of the constitution of Texas, which provides that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad," is not self-acting, but requires appropriate supplementing legislation prescribing the regulation of its exercise.

Railroad crossings, by intersecting lines, are such a source of danger from liability to collision in the transit of trains as could not be adequately compensated in damages, or by any moneyed consideration, and, except under the pressure of some paramount necessity, their construction should be enjoined.

When the right of way over private property, or the right of crossing a public highway has been acquired, certain common rights attach to the new acquisition, which are to be considered, protected, and enforced by the proper tribunals. Missouri, etc., R. R. Co. *v.* Texas, etc., R. R. Co., 10 Fed. Rep. 497.

Where the language of the statute is that no lease of one railroad by another shall be perfected "until a meeting of the stockholders of each of said companies shall have been called by the directors thereof, at such time and place and in such manner as they shall designate, and the holders of at least two thirds of the stock of such company represented at such meeting, either in person or by proxy, voting thereat shall have assented thereto," the stockholders' meeting,and the vote in such meeting upon the question of assenting to the proposed lease, are matters of essence, of substance, and not of mere form; and their assent individually obtained outside of such meeting, and in the absence of deliberation, would bind no one. Peters *v.* Lincoln and N. W. R. Co., U. S. C. C., D. Nebr., 12 Fed. Rep. 513.

A demurrer admits all facts well pleaded, but not conclusions drawn therefrom by the pleader.

Where a railroad company made a contract concerning all roads which it then did or might thereafter control, by ownership, lease, or otherwise, and thereafter acquired more than a majority of the stock of B., another railway company, and by voting such stock elected B.'s board of directors; and where certain persons were members of the board of directors of both A. and B., and the same persons were respectively presidents and vice-presidents of both companies: *held*, that A. had not acquired "control" of B. within the meaning of the terms of the contract, and that the word "control," as used in said contract, meant an immediate or executive control exercised by the officers and agents chosen by and acting under the direction of A.'s board of directors. Pullman Palace Car Co. *v.* Missouri Pacific Ry. Co. and another. U. S. C. C., E. D. Missouri, 11 Fed. Rep. 634.

merits. After submission this court will not go behind the order granting the appeal to determine whether the affidavit is sufficient or whether any affidavit whatever was filed. St. Louis B. and C. Co. *v.* Memphis, etc., R. R. Co., 72 Mo. 664.

A stockholder can only be made liable to an execution creditor of the corporation on garnishment when he is in default to the corporation for instalments due on his stock, or for calls made by the directors. If his liability is not due according to the terms of his subscription, and no call has been made by the directors, the creditor's remedy is by special execution awarded under section 13, page 291, Wagner's Statutes. (Following Hannah *v.* Moberly Bank, 67 Mo. 678.) Simpson *v.* Reynolds, 71 Mo. 594.

In an action against a stockholder of a railroad corporation by a creditor thereof, under the provision of the general railroad act (§ 10, chap. 140, Laws of 1850, as amended by chap. 282, Laws of 1854), making each stockholder liable for the debts of the corporation to the amount unpaid on his stock, the record of a judgment against the corporation is competent evidence of plaintiff's status as a creditor and of the amount due him.

The effect of said provision is not to impose any penalty or original liability upon the stockholder, but simply to confer upon the creditor of the corporation a right to pursue, for the satisfaction of his claim, the indebtedness of the stockholder to the corporation for his unpaid subscription. The creditor claims through the corporation, and if he shows that he is a creditor, by evidence binding and conclusive against it, the evidence is competent against the stockholder.

Miller *v.* White (50 N. Y. 137), McMahon *v.* Macy (51 id. 155), distinguished.

In such an action, on trial before a referee, after the case was closed it was reopened by order of the court for the sole purpose of allowing defendant to put in evidence certain exhibits and records; on the re-hearing, defendant offered oral evidence to sustain a counter-claim. *Held*, that it was properly excluded. Stephens *v.* Fox, 83 N. Y. 313.

When a partnership is created for a joint undertaking, each partner to collect certain proceeds, and the entire receipts to be shared upon a basis fixed in the agreement, any claim preferred by one against the other for a share of proceeds unfairly withheld, is the proper subject for the taking of an account to ascertain the various items of receipt and disbursement by either partner, to compare them together, and strike the proper balance. But if the parties themselves have cast up the items, and agreed upon the state of the account and the resulting balance either way, there is no further account to be taken, unless upon a suggestion of fraud,

mistake, or omission, operating to falsify their conclusion; and the court cannot interfere with the result thus settled by the parties.

Plaintiffs and defendant being both common carriers and owning connecting lines, made an agreement in relation to the transportation of two cargoes of goods over their lines, estimated the amount of freights to be collected by each and the profits to be realized on the whole transaction, and struck a balance. Plaintiffs then paid defendant in advance what it was estimated would come into their hands by way of collection in excess of their share of the profits. One of the cargoes was subsequently destroyed, in consequence of which part of the estimated profits were never realized. Plaintiffs, claiming that the enterprise was a partnership transaction, then sued to recover the amount of their advance and their share of the profits actually realized. The petition also contained a prayer for an accounting. The answer did not dispute the correctness of the several items which entered into the settlement or the accuracy of the balance ascertained, but denied the partnership and averred that defendant's share in the undertaking consisted in the rendering of services to plaintiffs, and that the money paid defendant was paid for such services. *Held*, that the issues joined were properly triable by a jury, and that the case was not one for reference or triable by the court. Plaintiffs' demands were of such a nature that they could have been recovered at common law under the counts for money had and received and account stated; and the prayer for an accounting did not change their nature.

Where one party to an alleged contract made by its agent denies the contract, and then introduces the agent to prove what the contract really was, such party will not be heard to deny the agent's authority to make any contract whatever. Silver *v.* St. Louis, etc., R. R. Co., 72 Mo. 193.

Contracts, which though invalid for want of corporate powers, yet if fully executed, shall remain as the foundation of rights acquired by the transaction.

A stockholder of a corporation will not be allowed, after a reasonable time, to disturb and rescind a contract made by his corporation, after the same has been fully executed, on the ground that it is ultra vires, and in excess of the corporate powers granted by the charter of the corporation.

Where a corporation issued preferred interest-bearing stock in excess of its authority, non-assenting stockholders must, within a reasonable time, dissent, and take steps to make their dissent effectual, or they will be held to have tacitly assented to the act of the corporation.

In actions seeking relief on the ground of fraud, where the statute of limitations has created a bar, the cause of action is not considered as having accrued until the discovery by the aggrieved

party of the facts constituting the fraud complained of; but this does not absolve him from all effort or diligence to obtain such knowledge, and facts of which he might have obtained knowledge had he sought it from its natural sources of information which were at his command, will be deemed within his knowledge.

The property of a corporation is a trust fund for the benefit of the stockholders in the hands of a corporate body, which is the trustee; but capital stock in the corporation in the hands of its owner, who has paid for it, is neither a trust fund, nor is its owner a trustee, and statutes of repose run to protect such owner in his right to such property. Taylor *v.* S. and N. Alabama R. R. Co. U. S. C. C., M. D. Ala., 13 Fed. Rep. 152.

Plaintiff's complaint alleged in substance that the railroad and franchises of the T., W. and W. R. R. Co., of which he was a stockholder, were sold under a decree of foreclosure and were bid off by a committee of the holders of the bonds secured by the mortgage; that a portion of the stockholders disputed the validity of the sale and a litigation arose which resulted in an arrangement under which said stockholders withdrew all opposition and were accorded by the purchasers of the road the right to take stock in a new company to be organized, upon certain terms specified, among others, that the option so to do must be made within thirty days, otherwise all rights should be forfeited; that in pursuance of this arrangement defendant, the W. R. Co., was organized and is operating the road and possesses the rights and property of the old company and has issued stock under the agreement; that plaintiff had no knowledge or notice of the agreement until after the expiration of the thirty days; that when notified he tendered performance on his part and demanded his proportionate share of the new stock which was refused. The other defendants were the purchasing committee who were authorized to carry out the said agreement. Plaintiff asked damages for the refusal. *Held*, that a demurrer to the complaint was properly sustained; that if the foreclosure sale was valid all of plaintiff's legal rights were cut off; if invalid his right to attack it was not affected or impaired by the agreement unless he elected to come in and ratify it, in which case he was bound to adopt it as such and could not vary its terms.

It seems that if the property and franchises of the old company had become vested in the new corporation without the intervention of legal proceedings cutting off the rights of the old stockholders, there would have been a foundation for plaintiff's claim. Thornton *v.* Wabash R. R. Co., 81 N. Y. 462.

Where a stock-yard company was organized by the officers of a railway company and others, and the only means put into the same was by the railway company, through its officers, who also controlled the stock-yard company, and the latter company issued

stock to the extent of its charter, a portion of which was used as a corruption fund and the balance divided between certain members of the company, they paying nothing therefor, it was *held*, that the issue of the stock was in violation of law and in fraud of the rights of the stockholders of the railway company, and vested in the recipients of the same no rights which a court of equity would enforce or protect. The stock, if of any validity, belonged to the railway company.

Where the holder of a certificate of stock in a corporation, which had been issued to him without consideration and in fraud of the rights of others, surrendered the same to an officer of the company issuing the same, under an agreement that new certificates should be issued in lieu of the one given up, a portion of which was to be retained and used for the purpose of corrupting certain officials in the interest of the company, and the rest to be returned to such holder, it was *held*, that as the agreement under which the certificate was surrendered was illegal and void, the agreement to return to him the balance of such certificates could not be enforced, either at law or in equity.

Nothing is better settled in the law of contracts than that if any part of the consideration upon which a promise rests is illegal, the entire promise fails. But this is not true e converso. Tobey *v.* Robinson, 99 Ill. 221.

The discharge of a receiver furnishes no ground of appeal. Nor does the rescission of an interlocutory order of sale, which determined no right.

An appeal will lie, under Art. 5, sec. 21, of the Code, from an order directing a sale, but not from an order refusing to authorize a sale before final decree, or from an order suspending or rescinding an interlocutory order of sale.

Where one creditor cannot be injured by the dissolution of an injunction granted on the filing of a bill by creditors against a corporation, and its continuance would defeat the plans for the re-organization of the corporation entered into by the creditors, and would be inconsistent with previous orders in the cause, there is no equity that would justify the Court in maintaining the injunction at the sole instance of one creditor as against all the other creditors, as well as the corporation. Washington City, etc., R. R. Co. *v.* Southern Maryland R. R. Co., 65 Md. 153.

Corporations acquiring title to lands along the line of a railroad may recover damages for injuries to such lands arising from the negligence of the receiver of such road and his agents engaged in operating the line, notwithstanding they acquired such title for purposes foreign to the object of their creation. Such fact is no defence to an action for damages for injury to their lands. Far-

mers' Loan & Trust Co. *v.* Green Bay & Minn. R. Co., U. S. C. C., E. D. Wisconsin, 12 Fed. Rep. 773.

There is nothing in the charter of the Cheraw and Chester R. R. Co. (15 Stat. 442) which requires its whole capital stock to be subscribed before calls are made for the payment of subscriptions; and therefore stock subscriptions may be made payable upon such terms as are agreed upon between the corporation and the stockholders.

When a contract does not call for any demand of payment by specified persons or in a particular mode, a general demand is all that need be alleged in the complaint.

An omission to state in the complaint that plaintiff was ready to perform his part of the contract sued upon, does not affect the substantial rights of the defendant; and the judgment of the Circuit Court disregarding such omission may not be reversed on appeal. Code, § 199.

Complaint alleged the subscription by defendant to the stock of plaintiffs' company of fifty acres of land, and a refusal to convey, and demanded payment in money for the land so subscribed, without alleging a promise to pay money or a previous demand for money—*Held*, on demurrer, to state facts sufficient to constitute a cause of action. Cheraw, etc., R. R. Co. *v.* Garland, 14 Shand. 63.

Where the complaint alleges a corporate existence in the plaintiff, and no facts or circumstances appear upon the face of the complaint showing in plaintiff a want of corporate authority, or of capacity to sue, a demurrer to the complaint under Class 2, of Section 167 of the Code, cannot be sustained.

A reference to its charter in the complaint of a corporation plaintiff does not so incorporate the charter into the complaint as to render the statement of its right to sue defective, by reason of the failure to allege the performance of conditions precedent to its corporate existence.

The performance of conditions precedent to a corporate existence is a matter of proof, and a failure to allege such performance is not ground for demurrer under the second class of Section 167 of the code.

The charter of a railroad company conferred corporate powers in terms importing an immediate grant, with a proviso "that said persons shall commence operations upon said road within two years after the passage of this act, and complete the same within five years." *Held*, that the requirements of the proviso were not conditions precedent to a corporate existence.

The charter of a railroad company permitted subscriptions in labor, materials or land, as well as in money; in action brought by the corporation to recover a stock subscription, the complaint alleged that the "defendant subscribed to the joint stock of the

said company four hundred dollars, for and in consideration of eight shares of the capital stock," and also alleged a demand of payment. *Held*, on demurrer, that the complaint sufficiently stated that the subscription was payable in money and was due before action brought.

The word "subscribe," in contracts of this nature, has a distinctively definite sense, and includes the idea of a promise to pay the amount subscribed in the manner agreed upon.

Where a demurrer to a complaint is overruled, the circuit judge may require the payment of all costs up to that time, as a condition of leave to answer. Cheraw, etc., R. R. Co. *v.* White, 14 Shand. 51.

By the first section of an act of incorporation, a railroad company were declared to "be, and they are hereby created, a body politic and corporate;" and in a subsequent section it was enacted "that when $100,000 shall have been subscribed, and $1 on each share shall have been paid in, the said company may organize and proceed to work." *Held*, that this requirement was sufficiently complied with when $100,000 were subscribed, and a sum in gross paid in equal to $1 upon every share subscribed.

Held, further, that a failure to comply strictly with these requirements would not have affected the corporate existence, but would have been an irregularity only, which could not defeat the right of the corporation to recover a stock subscription. S. & A. R. R. Co. *v.* Ezell, 14 Shand. 281.

A corporation is not liable for labor to persons hired by a contractor or sub-contractor except so far as it is indebted to the latter.

Where a declaration sets forth separate causes of action, one of which is statutory and the other at common law, neither can be established if facts needed to make out either are wanting.

An unwritten promise by a railroad corporation to a contractor, to pay the latter's obligations to his laborers, will not sustain an action.

Where a railroad contractor has assigned his contract to the superintendent of the company and the latter has assumed his debts to laborers, the company's liability, if any, for a labor debt does not rest on Comp. L., §§ 2393–5, but is at common law on a special contract; and the declaration must so aver the cause of action. Bottomley *v.* Port Huron, etc., R. R. Co., 44 Mich. 542.

An oral agreement by a railroad corporation to release to a person one of two parcels of land included in its location and owned by him at the time the location was filed, upon the consideration that he should not demand or collect damages for taking the land so released, is an agreement for the transfer of an interest in lands within the statute of frauds; and neither the building of fences by the corporation, after the making of the agreement, dividing the

land released from the land used by the corporation for its railroad, and the digging of a new channel for a brook along the dividing line between the land, nor the refraining by the owner from collecting compensation for the taking of the land covered by the agreement, and the continued occupation by him of the land, constitute such part performance as to warrant a decree in equity for the specific performance of the agreement. Barnes *v.* Boston & Maine R. R. Co., 130 Mass. 388.

Evidence in this case held to show that an agreement to convey right of way through certain lands was executed upon certain conditions that were never complied with, and to present no proper cause for specific performance. Hastings & Avoca R. Co. *v.* Miles, 9 N. W. Rpr. 336.

Where the owner of land grants a right of way over his land for a switch from a railroad to the land of one of the grantees, to be used by the grantees and others for railroad and switch purposes, and the owners of such right of way purchased eighty acres of land from another, over a part of which the switch was constructed, so as to reach the coal land of one of the grantees, the grantor contributing nothing to the expense of grading and bridging the track for the switch, it was *held*, that this right of way became appurtenant to the coal land of the grantee, to which the switch was constructed.

A right of way appurtenant may be reserved in a conveyance as effectually as by a grant by deed. Hence, in a grant of a right of way for a railroad switch, the words, "and upon the further consideration that said grantees permit said grantor to use said switch and railroad, the same as the grantees," amount to a legal and binding reservation of a use in common with the grantees of the right of way granted, but they do not confer any right in the grantor over other land afterwards bought by the grantees for an extension of the right of way to their lands, in the absence of any agreement to that effect, and do not even reserve a right of way appurtenant over the grantees' tract of land.

An easement or right of way appurtenant or appendant to an estate in fee in land, or in gross to the person of the grantor for life or for years, is incapable of alienation or conveyance in fee. When in gross, it is purely personal to the holder, and when appurtenant, it is attached to and is an incident to the land, and passes with it, whether the land be conveyed for a term of years, for life, or in fee. It is an incident to the land, and cannot be separated from or transferred independent of it. Sec. 13 of the Conveyance act has no application to easements created outside of the title to land, whether appurtenant or in gross.

A private switch from a railroad to coal lands, which is not owned by the railway company, but by individuals for their own

private use, is not a public highway, within the meaning of section 12, article 11, of the constitution, and therefore is not free to all persons for the transportation of their persons and property thereon. That section applies only to public railroads. Kœlle *v.* Knecht, 99 Ill. 396.

Land already acquired by one railroad corporation, and held for the necessary enjoyment of its essential franchises, cannot be condemned and appropriated in the usual way by another corporation.

A railroad can only acquire and hold an amount of real estate commensurate with its necessities.

Whether or not this limit has been overstepped is a proper subject of judicial investigation, where the controversy before the court arises from an alleged encroachment by another corporation; but every reasonable intendment must be made in favor of the corporation that was the first to acquire title. Lake Shore, etc., R. R. Co. *v.* N. Y., C. & St. L. R. R. Co., 8 Fed. Rep. 858.

Where a jury is required merely to determine the damages or compensation for taking property for a railroad company, a finding in general terms is sufficient, and it need not specify the amount allowed for each item of injury. And, unless there are indications to the contrary, the presumption is that all evident facts bearing on the amount of damages were taken into account.

Objections to the petition and award in proceedings for the condemnation of land must be clearly specified.

A description in an award condemning lands for railway purposes allowed a strip 30 feet wide on each side of a given line across the entire premises except that in crossing a specified parcel a strip only twenty-five feet wide was allowed south of the line. It also described another parcel by making the boundary begin and end at the east end of the northerly outside line of the former and by giving the courses and distances. *Held* sufficient.

An award of damages for land condemned for railway uses was sustained where it expressed the gross sum allowed to all joint claimants and specified how much of it was for each of those interested as mortgagees.

Whether question on appeal under the railroad law can be brought up by bill of exceptions—Q.

An inquest of damages for lands condemned for railway uses may be conducted by a jury without legal assistance, and liberal practice in the admission or rejection of testimony is allowable; and the conclusions of the jury thereon will not be disturbed except for rulings that were manifestly inaccurate and did substantial injustice.

It is not error in proceedings to condemn land to exclude on cross-examination of a witness a question as to his opinion upon

facts the existence of which he has denied, especially when he has in effect answered the question in his direct examination.

The value of land for farm use is a proper subject of inquiry in proceedings to condemn it for railway purposes.

An objection that the award of a jury in proceedings to take land "is against the law and evidence in the case" cannot show what objections are deemed waived, and is insufficient to raise any question. Michigan Air Line R. R. Co. *v.* Barnes, 44 Mich. 222.

A complete contract being established between a railway company and a landowner by the notice to treat, and an award under the Lands Clauses Consolidation Act, 1845, fixing the amount of the purchase-money, the ordinary rules as between vendor and purchaser apply to such a contract, including the liability of the purchasing company, in a proper case, to pay interest on their unpaid purchase-money.

Thus, where the title has not been accepted before the award, and the company, not being in possession, delay paying or depositing the purchase-money, they are liable to pay interest at 4 per cent per annum, not from the date of the award, but from the time they might prudently have taken possession; that is, when a good title was shown.

In re Eccleshil Local Board (13 Ch. D. 365) disapproved.

Where a railway company has given notices to treat to a legal tenant for life under a settlement and to the trustees of the settlement who have a bare power of sale with his consent, and the purchase-money for the life estate is fixed as between the company and the tenant for life by award under a reference to arbitration under the Lands Clauses Act in the usual way, the trustees taking no part in the reference, the company cannot require the sale to be completed as a sale by the trustees, but it must be completed as a sale by the tenant, for life under the Act. In re Pigott and the Great Western Ry. Co., L. R. 18 Chan. Div. 146.

Without a deed a railroad location can never become legal except on payment or waiver of the land damages, or by prescription. In no other way can the company acquire legal, permanent possession.

While the lapse of six years from the time an action accrued for land damage might, unexplained, constitute a waiver of damage, yet where the circumstances show that there has been no waiver, and no title acquired by prescription, simple lapse of time would not bar the land-owner's right to bring suit against the road for an obstruction which was a continuing trespass, though there would be a limitation of damages to the period of six years, immediately preceding the date of the writ. Perkins, adm., *v.* Maine Central R. R. Co., 72 Me. 95.

If a railroad company takes possession of land without the owner's consent, and without having ascertained, under the process given by the statute, and paid, the due compensation therefor, it is a trespasser, and liable in an action of trespass.

The mere failure of a land-owner to order a railroad company off his land, or to bring his action against it as a trespasser until near the end of the statutory period of limitation, will not operate as a consent to its occupation and use of the land.

Several years before the commencement of this action, at the instance of the defendant company, proceedings were had to condemn land, which were regular, except that the commissioners awarded a gross sum as compensation to all of six lot-owners, who held in severalty (including the plaintiff,) without specifying the sum to which each was entitled. The company paid the money into court, and nothing further was done in the proceeding. *Held*, that the condemnation proceedings are ended, and not pending so as to permit the award to be now corrected at the instance of either party, and that they were without any effect upon the rights of the parties. Rusch *v.* Milwaukee, etc., R. R. Co., 54 Wis. 136.

After an appeal had been prayed and allowed in favor of the land-owner, in a proceeding to condemn his land for a right of way, in which his compensation had been fixed by a jury, the railroad company seeking the condemnation paid the sum found by the jury to the county treasurer, and gave the proper bond, as required by the statute, to give a right to enter upon the land. Before the judgment in the proceeding was reversed, on the appeal to this court, the land-owner accepted the money deposited with the treasurer, which he never offered to return, and without causing the remanding order to be filed and the cause redocketed for further proceedings, brought ejectment against the lessees of the railroad company for the land used as a right of way. *Held*, that as the possession, when first taken, was lawful, the mere reversal of the judgment without taking any further steps, or returning or offering to return the money paid, did not render the continuance of such possession unlawful, and that the action could not be maintained.

The reversal of a judgment condemning land for a right of way, on appeal by the land-owner, will not divest the possession of the corporation procuring the condemnation lawfully obtained, or render its continuance unlawful. It has no effect whatever upon the right of possession. In such case, if the land-owner deems the compensation allowed and paid to him as insufficient, he should, within two years after the reversal, have the cause remanded and docketed, giving the proper notice, and have another trial. If he fails to do so, and retains the sum paid him, he may be regarded as abandoning any claim for further compensation.

The action of ejectment proceeds for the possession of premises, claiming that they have been unlawfully entered and unjustly withheld, and facts which go to disprove these make a legal defence. St. Louis, etc., R. R. Co. *v.* Karnes, 101 Ill. 402.

Where the owner of land adjoining the right of way of a railway company, under an agreement with the company, erected a fence along the line between his land and the right of way, and took upon himself to maintain it, it was *held*, that as between such owner, and those holding under him with knowledge of his duty, on the one part, and the railway company on the other, the duty of maintaining and repairing the fence did not rest on the company.

A tenant of such owner, while in the occupancy of the premises, and with full knowledge of the undertaking of his landlord in respect to keeping the fence mentioned in repair, and with knowledge of the condition of the fence, placed his live stock in the inclosure which was separated from the right of way by this fence. The stock in some manner got upon the railway track through the fence, and were killed by a passing train. In an action by the tenant against the company to recover for the stock killed, it was held, that he could not allege any want of sufficiency in the fence as a ground of recovery. St. Louis, etc., R. R. Co. *v.* Washburn, 97 Ill. 253.

The defendant, in consideration of the grant of a right of way through the plaintiff's land, agreed to build for the plaintiff a certain wagon-road, and also to fence both sides of the way. In an action for the breach of these agreements, *held*, that the plaintiff was entitled to recover what it would reasonably cost to construct the road and fence. Taylor *v.* North Pacific Coast R. R. Co., 56 Cal. 317.

The right of eminent domain resides in the State, and may be enforced, not only in behalf of the State, but of any artificial person clothed with a franchise, the enjoyment of which promotes a public use. The basis of the enforcement is the necessity for the public use of the property the taking of which is sought.

If proceedings are instituted to condemn for public use the property of an individual, and after the value of the property is ascertained by inquest, the proceedings are abandoned because the price assessed is unsatisfactory, the corporation instituting such proceedings will be answerable to the owner for all damages occasioned by them.

Where property, against which proceedings to condemn for public use have been instituted and afterward abandoned, belonged to A and B, co-tenants, who in resisting the proceedings employed different counsel, who severally attended to the management of

the case; *held*, that it was error to permit them to sue jointly to recover damages for counsel fees.

In an action to recover damages for the institution of proceedings to condemn private property for public use, money need not have been actually paid out to entitle plaintiff to recover; but if a debt has been created by reason of such proceedings, a damage has been incurred for which an action will lie. Leisse *v.* St. Louis, etc., R. R. Co., 72 Mo. 561.

A person stacks his hay in a meadow 150 to 200 yards from a railroad track, and the sparks from a passing engine ignite the grass fifty-six feet from the track, and there is no obstacle to prevent the fire from reaching the hay through the dry grass, and nothing has been done to prevent it, and the hay is burned and destroyed by the spreading of the fire; *Held*, Whether the owner thereof is guilty of contributory negligence or not, is a question of fact for the jury, and not a question of law for the court to decide.

In such a case, where the charge and instructions omit all mention of contributory negligence on the part of the plaintiff, and the defendant asks the court to instruct the jury—"It is a circumstance the jury may consider, as going to prove contributory negligence, that the plaintiff stacked his hay near the railroad track, without guarding it in any way from fire. Persons who live near railroads are bound to take notice of the increased danger to their property from fire, and to exercise a proportionate amount of care to protect it,"—*held*, material error to refuse the instruction. Kansas City, etc., R. R. Co. *v.* Owen, 25 Kan. 419.

At the trial of an action against a railroad corporation, for the destruction of the plaintiff's property by fire alleged to have been communicated from a locomotive engine of the defendant on its outward trip, the defendant introduced evidence that the engine was furnished with the ordinary appliances of a cone and netting for arresting sparks, which netting was examined on arrival at the end of the route on the return trip the following day and found to be whole and in good condition; and that the engine on the return trip was in the same condition and used the same kind of fuel as on the outward trip. *Held*, that it was competent for the plaintiff to show in rebuttal that the engine on the return trip emitted sparks which set fire to property in the same neighborhood. Loring *v.* Worcester, etc., R. R. Co. 131 Mass. 469.

In an action against a railroad company for setting fire to a barn by sparks from a locomotive, the communication of the fire being proven, it is incumbent upon the company to show by proof that the loss was not in consequence of negligence on its part, and that the engine was properly constructed and in good condition. Simpson *v.* East Tennessee, etc., R. R. Co., 5 Lea. 455.

A kerosene lamp was left burning after midnight and after all persons had left the building, in defendant's telegraph office, and mounted upon a bracket attached to the frame of a window in the partition between such office and defendant's warehouse; and before morning the warehouse and plaintiff's goods therein were destroyed by fire. Assuming that the fire was caused in some way by the burning lamp, the question was, whether defendant was guilty of a want of ordinary care in leaving the lamp thus burning; and there was no proper evidence upon that question, apart from the above facts. *Held*, that it must be presumed that defendant used due care in respect to the lamp, its material, construction and location, the oil used therein, etc.; and that there was nothing to support a verdict against defendant.

The statement of a witness that he would have considered it dangerous to leave the lamp burning, is not admissible as evidence in such a case. Wood *v.* Chicago, etc., R. R. Co., 51 Wis. 196.

In case of personal injuries inflicted by railroad cars in motion, where the plaintiff's negligence contributed to his injuries, he cannot recover.

A railroad company is not liable for injuries inflicted on a person through the negligence of a fellow-servant of such person. Fellow-servants or co-servants, within this rule, are persons engaged in the same common service under the same general control. Where one servant is invested with control or superiority over another with respect to any particular part of the business, they are not, with respect to such business, fellow-servants within the meaning of the law.

When a person enters into the service of another he assumes all the ordinary risks incident to the employment, and the employer agrees, by implication of law, not to subject the servant he employs to extraordinary or unusual perils or dangers, and that he will furnish the employee with reasonably safe and convenient machinery with which to perform his duties.

The law presumes that railroad companies employ for their service persons of reasonable competency and fitness for their duties; and this presumption exists till the company is notified of their incompetency and unfitness. The same rule substantially applies to the question of the sufficiency of the machinery employed. Gravelle *v.* Minneapolis & St. Louis R. R. Co., U. S. C. C., D. Minn., 10 Fed. Rep. 711.

A railroad company is bound to furnish to its employees reasonably safe and convenient machinery with which to perform their duties, and if it fails in this, and an employee is injured on that account and without fault of his own, it is liable in damages.

Where the custom of the railroad company was to allow links to be scattered about the yard for any employee to pick up when

needed for use in coupling cars, failing to affix the link to the tender was negligence of the company and not of a fellow-servant of the employee.

Alleged variances between the allegations and the proof do not constitute a sufficient ground for a new trial.

Fellow-servants are such as are employed in the same service and subject to the same general control; but if a railroad company sees fit to invest one of its servants with control or superior authority over another with respect to any particular part of its business, the two are not with respect to such business fellow-servants, one being subordinate to the other. Gravelle *v.* Minneapolis & St. L. R. R. Co., U. S. C. C., D. Minn., 11 Fed. Rep. 569.

Where an agreement was entered into between the holders of the mortgage bonds and other creditors of a railroad corporation, after proceedings had been instituted and were pending for the foreclosure of the mortgage liens on its property, whereby provision was made for the appointment of a committee, who were to obtain a decree of foreclosure in the pending suit and purchase the railroad, its rights, privileges, franchises, and property for all the holders of bonds, stocks, and indebtedness of the old company, at the foreclosure sale; for the incorporation of a new company; for the delivery, by the holders, of the bonds, indebtedness, and stock of the company to a third party, subject to the order of the committee; for the conveyance by the committee of its purchase to the new corporation, who should mortgage the same by giving first and second mortgages to secure the issue of a large amount of bonds, and who should issue stock; for giving (1) to the holders of the mortgage bonds of the old company, in place of their old securities, the new bonds, secured by the two mortgages, at rates fixed by the agreement; (2) to the holders of the floating debt of the old company, in place of their surrendered evidences of indebtedness, second preferred income bonds of the new company at par (these bonds being secured by the second mortgage) to the full amount of their respective debts and interest; (3) to the holders of the first preferred, the second preferred, and the common stock of the old company, when surrendered, stock in the new company to the amount, respectively, of 50 per cent, 30 per cent, and 25 per cent, of the stock of the old company which they had owned: *held*, that a bill by a holder of a part of the floating debt of the old company, charging that this plan of reorganization is fraudulent as against the creditors of the old company, and seeking to have the stock of the new company, provided in the agreement to be issued to the stockholders of the old company, placed in the hands of a receiver and sold, and the proceeds applied to the payment of the plaintiff and such other creditors as should come in and be made parties, will be dismissed for want of equity, on the ground that the plan

has a due regard for the interests of all classes of creditors and stockholders, and the bill fails to show that any injustice was intended or has been done to this creditor. Hancock *v.* Toledo, etc., R. R. Co., 9 Fed. Rep. 738.

In a suit by the bondholders of a railroad company holding bonds secured by a first mortgage on a part of the road and a second mortgage on the rest of the road, and praying that an account be taken of the earnings received from the different parts of the road, and for payment of the amount due to the plaintiff, or, in default, for a foreclosure of the mortgage; and asking that a receiver be appointed, and for other relief,—the trustees of the second mortgage, under which the plaintiff claims, are necessary parties.

If they are residents of another State, the statute of 1875, c. 137, § 8, provides for summoning all such absent parties, where there is property within the jurisdiction upon which a lien is claimed.

Where a State statute provides for the rights and duties of trustees of a corporation, it relieves the parties from providing therefor in each mortgage executed under the laws of such State. Mercantile Trust Co. *v.* Portland & Ogdensburgh R. Co., U. S. C. C., D. N. Hamp., 10 Fed. Rep. 604.

If there is conflicting evidence on which the jury should pass, the court cannot draw to itself the decision of what the evidence or the weight of evidence establishes.

An employer who introduces, without notice to his employee, new and unusual machinery, whether belonging to himself or another, involving an unexpected or unanticipated danger, through the introduction of which the employee, while using the care and diligence incident to his employment, meets with an accident, is liable in damages.

Where an accident occurs to a railroad employee in consequence of the introduction of a foreign and defectively constructed car into the train on which he is employed, and he sues the railroad company for damages, he is not bound to allege in his petition that the accident was caused by the introduction of a foreign car. O'Neil *v.* St. Louis, etc., R. R. Co., 9 Fed. Rep. 337.

If a master or another servant, standing towards the servant injured in the relation of superior or vice-principal, orders the latter into a situation of danger, and he obeys and is thereby injured, the law will not charge him with contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even under orders from one having authority over him.

If the circumstances be such that men of ordinary intelligence may honestly differ as to the question of negligence, it must be left

to the jury. Miller *v.* Union Pacific R. R. Co., C. C. D. Col., 12 Fed. Rep. 600.

A railroad company will not be liable for a failure to comply with the requirements of the statute when a person appears upon the road, if, after such person could have been seen by the lookout, a compliance was impossible. East Tenn. & Va. R. R. Co. *v.* Swaney. 5 Lea. 119.

Federal courts have authority to order causes pending before them of a like nature, and in which substantially the same questions are involved, though against different defendants, to be tried at the same time, even where, in consequence, the defendants will be brought into antagonism.

Where causes, one of which sounds in tort and the other in contract, are tried at the same time, separate judgments may be rendered in each.

Where several tort-feasors are each and all liable for the same wrongful act, a separate suit for damages may be maintained against each of them.

A common carrier is liable to a passenger whom it has contracted to convey to a particular point, if he is injured while being so conveyed through the negligence or unskilfulness of employees of a corporation with which such carrier has contracted for motive power.

In such cases the corporation furnishing the motive power is also liable to the passenger if the injury is sustained through the direct negligence or unskilfulness of its employees. Keep *v.* Indianapolis and St. Louis R. Co.; Keep *v.* Union Ry. and Transit Co., 10 Fed. Rep. 454.

In an action by C. against a railroad company for injuries caused through the negligence of the railroad company, it is error for the court to give an instruction to the jury which makes the conduct of the plaintiff the only condition upon which his right of recovery depends, and which virtually says that if the plaintiff was careful and prudent that he may recover, whether the defendant was negligent or not.

Where C. sued a railroad company for only $57, and did not at any time ask or obtain leave to amend, and did not amend, his pleadings, *held*, that it was error for the court to render judgment in favor of the plaintiff and against the defendant for $72 and costs. Atchison, etc., R. R. Co. *v.* Combs, 25 Kansas, 729.

In an action for damages for personal injury sustained by a railroad employee, caused by a defective construction of employer's caboose, where it was shown that the car was dangerous and liable to accident at all times, and that the company had knowledge of

that fact, the plaintiff has a right of action. Palmer *v.* Denver and Rio Grande Ry. Co., U. S. C. C., D. Col., 12 Fed. Rep. 392.

In an action for damages for personal injuries sustained by reason of the negligence of the defendant, a railroad company, where there was great discrepancy in the evidence, the question of whether injury was inflicted by the negligent acts charged is for the jury to determine.

Where it is shown that the plaintiff was injured by the accident, the question whether defendant is legally responsible is a mixed question of law and fact.

The master is not liable to his servant for injuries produced by his fellow-servant engaged in the same business and common employment, provided there be no negligence in the appointment of such negligent servant, or in his retention after notice of his incompetency.

When an employee enters into an engagement with his employer he assumes all the risks of the service arising from the negligence of his fellow-servants engaged in the same business or common employment.

When the business is carried on by machinery, it is the master's duty to keep the machinery in such condition as, from the nature of the business and employment, the servant has the right to expect that it would be kept, and where he fails to do so he is liable for injuries arising from his negligence.

In estimating the damages for personal injuries caused by negligence, the rule is that it should be such an amount as will compensate for pain and suffering, expense of physician and medicine, loss of wages if a laboring man, loss of business if engaged in business, also injury to him physically and mentally, affecting his capacity to labor or carry on business; and in considering these the jury may include not only past losses but continuing losses, where the evidence satisfies them that the injuries will continue. Totten *v.* Pennsylvania R. R. Co., U. S. C. C., D. N. J., 11 Fed. Rep. 564.

A passenger, on a train that had approached a station and was still moving slowly, stood on the lower step of a car, in the act of stepping to the platform of the station, when, in consequence of the car being moved forward with a jerk, he was thrown upon the platform and injured. *Held*, that he was guilty of contributory negligence in attempting to alight from the train while it was in motion. Secor *v.* Toledo, etc., R. R. Co., 10 Fed. Rep. 15.

For damages for the death of a minor, killed by the running of a railroad train, the father, if living, must sue. If the mother sues she must show affirmatively and positively that the father is dead.

The allegation that she is a widow is not sufficient. St. Louis, etc., R. R. Co. *v.* Yocum, 34 Ark. 493.

When a crossing is dangerous, the duty is imposed upon those engaged in conducting the engine and trains upon the road, and also upon those desiring to make the crossing, to use every reasonable precaution to avoid a collision; and the necessity is increased in proportion to the danger. This duty is required equally of both parties.

Where one attempts to drive his team over a railroad crossing on a level with the highway with knowledge of its dangerous condition; that a warehouse formed an obstruction to the sight and sound of a train coming from one direction; that it was the time for making up a train and that the locomotive must pass the crossing to do so—he must both look and listen for the approach of the locomotive, and, if need be, stop for that purpose.

Railroad employees are as worthy of belief as other agents. Tucker *v.* Duncan, 9 Fed. Rep. 867.

An infant, to avoid the imputation of negligence, is bound only to exercise that degree of care which can reasonably be expected of one of its age. Byrne *v.* N. Y., etc., R. R. Co., 83 New York 620.

No decree should be entered or order allowed for the specific performance of a contract, where there is not a mutuality of remedy between the parties obtainable from the court.

The court will not allow an injunction to compel the specific performance of continuous covenants with intricate detail, running through a period of nine years, over a vast system of railways, unreasonably taxing the time, attention, and resources of the court and its officers, and interfering in the general administration of justice.

Courts ought not to favor a monopoly in the accommodations which are necessaries to the travelling public, or foster it by the invention or application of extraordinary or unusual orders or remedies. Pullman Palace Car Co. *v.* Texas & Pacific R. Co., U. S. C. C., E. D. Texas, 11 Fed. Reps. 625.

By the act of July 2, 1864 (13 St. 365), the odd-numbered sections along the line of the Northern Pacific R. R. Co., for 40 miles on either side of the line in the territories and 20 miles in the States, is set apart and devoted to construction of the road of said corporation; but said act is not a present grant of said lands to said corporation, but only in effect an agreement or provision that the same shall be conveyed to it absolutely when and as fast as any 25 miles of said road is constructed and accepted by the United States; and in the mean time the legal title to the unearned and unpatented sections is in the United States, who may, therefore, maintain legal

proceedings against any one that unlawfully cuts timber thereon. United States *v.* Childers, U. S. D. C., D. Oregon, 12 Fed. Rep. 586.

The grant made to Iowa by the act of May 15, 1856, c. 28 (11 Stat. 9), to aid in the construction of a railroad from Davenport to Council Bluffs, is in præsenti, and, with certain exceptions therein specified, it vested in the State the title to every section of public land designated by odd numbers for six miles in width on each side of the road, when the line thereof should be definitely fixed.

The act authorized the State, subject to the approval of the Secretary of the Interior, to select, within the limit of fifteen miles of the road, land in alternate sections equal in amount to that which, within the six-mile limit, had been sold or otherwise appropriated by the United States. Quære, Does the right to any particular section or part of section, beyond the six-mile limit, vest in the State before the selection of it has been reported to and approved by the proper officer?

After the lands had been duly certified to the State or to the railroad company, to which she transferred them, the legal title thereto was subject to be defeated only by the United States, should there be a breach of any condition annexed to the grant, and it was not divested by a change of the location of part of the line of road authorized by the act of June 2, 1864, c. 103 (13 Stat. 95), although they are not situate within twenty miles of the relocated line. Subsequent settlers could, therefore, acquire no right thereto under the pre-emption or the homestead laws. Grinnell *v.* R. R. Co., 103 U. S. 739.

In an action against a corporation for the conversion of certain staves, defendant offered evidence that they were cut from land owned by the president of the corporation, in connection with evidence that the president had directed the taking of them. There was no evidence that he had not granted permission to plaintiffs to cut the staves, and no other evidence that they belonged to him. *Held*, that the offer was properly rejected. Allen *v.* St. Louis, etc., R. R. Co., 72 Mo. 386.

A court of bankruptcy ordered the assignee of a railroad company, which had appropriated plaintiff's land to its own use, to pay him $200 for his damages upon receiving from him a deed to the land. Plaintiff was a party to the bankruptcy proceedings, but he declined to take the money or make the deed. In an action by him against one claiming under the company to recover for the land; *Held*, that the order of the bankruptcy court was no judgment and no bar to his recovery. Burnes *v.* St. Louis, etc., R. R. Co., 71 Mo. 163.

In suing a railroad company for a labor debt under Comp. L.,

§§ 2393–5, a declaration on the common counts in assumpsit with mere allusions to the statute and a statement of plaintiff's title by assignment, is not enough; the existence of the facts upon which the statute bases the right of action must be averred.

A statute, even when it is remedial, must be followed with strictness where it gives a remedy against a party who would not otherwise be liable.

A statutory right of action against a corporation for labor done and materials furnished follows the assignment of the claim; otherwise it would be determined by the claimant's death, and perhaps by his insolvency.

Contractors and sub-contractors are not "laborers" within the meaning of the statute giving a right of action for labor debts.

Under an act giving a right of action for labor debts, a laborer may sue for work done by his team, where no right arises from its service to any other person.

Time-checks issued by a sub-contractor to laborers are in the nature of hearsay, and inadmissible against objection in an action for a labor debt.

A suit against a railroad corporation for a lahor debt is to fix it with a liability resulting from its ownership of the road, and will not admit of the theory that defendant is merely an agent of the owner. Chicago, etc., R. R. Co. *v.* Sturgis, 44 Mich. 538.

The revival of an action does not necessarily carry with it the whole of the prior right of action.

Where a right of action for damages which can survive involves, mingled with, but separable from such damages, other damages of a character that die with the party, the revival of the action does not draw the latter with it and permit a recovery therefor.

Upon the death of the plaintiff, in an action by a husband for a wrongful injury to the person of his wife, the right to damages for loss of the wife's services and the expenses necessarily incurred by reason of the injury, survive to his personal representatives as they are a pecuniary loss diminishing his estate; but the right of action for the loss of the society of his wife, and the comforts of that society dies with him.

Upon revival of the action, therefore, only the damages that so survive are recoverable. Cregin, Adm., *v.* Brooklyn, etc., R. R. Co., 83 N. Y. 595.

A railroad formed by the consolidation of three roads chartered respectively by three different states, cannot, when sued in the courts of one of those states by a citizen thereof, remove the case into the federal courts under the act of March 3, 1875, upon the ground that the charters obtained from the other two states give it a foreign citizenship.

The P., W. and B. R. R. was chartered by the state of Pennsylvania. Subsequently, by concurrent legislation of the states of Pennsylvania, Maryland, and Delaware, it was consolidated with two other roads, chartered respectively by the latter two states, the consolidated road retaining the name of the P., W. and B. R. R. Suit was brought by a citizen of Pennsylvania, in the courts of that state, against the P., W. and B. R. R., who thereupon removed the case to the federal court on the ground of foreign citizenship. *Held*, that the federal court had no jurisdiction, and that the suit should be remanded. Johnson *v.* Philadelphia, etc., R. R. Co., 9 Fed. Rep. 6.

If the owner of land is disseised while in possession, he may maintain an action of trespass for the act of disseisin; and it is immaterial that the declaration alleges, as aggravation of the entry, acts which the plaintiff is not permitted to prove.

If the report of a case states the nature of the action, and that "the case" is reported for the consideration of this court, the declaration is incorporated into the report. Thomas Murray *v.* Fitchburg R. R. Co., 130 Mass. Reports, 99.

Where foreign corporations engage in business in a state whose laws provide that they may be summoned by process served upon an agent in charge thereof, they are "found" in the district in which such agent is doing business, within the meaning of the act of Congress of March 3, 1875, (18 St. at Large, 470), and may be served in that manner in suits brought in the United States courts. Mohr and Mohr Distilling Co. *v.* Ins. Cos. 12 Fed. Rep. 474, followed.

Railroad corporations are quasi public corporations, dedicated to the public use. In accepting their charters they necessarily accept them with all the duties and liabilities imposed upon them by law. Thus a quasi public trust is created which clothes the public with an interest in the use of railroads, which can be controlled by the public to the extent of the interest conferred therein.

In the absence of some statute providing another and different remedy, courts of equity have jurisdiction to enforce this quasi public trust, and compel railroad corporations to discharge the duties imposed upon them by law; and persons injured by the wrongful action or non-action of such corporations may seek redress by injunction, and are not bound to resort to proceedings in mandamus or to an action at law for damages.

A railroad company cannot bind itself to deliver to a particular stock-yard all live-stock coming over its line to a certain point, but it is bound to transport over its road and deliver to all stock-yards at such point, reached by its tracks or connections, all live-stock consigned, or which the shippers desire to consign, to them, upon the same terms and in the same manner as under like conditions it

transports and delivers to their competitors; and the performance of this duty may be compelled by injunction at the suit of the proprietor of the stock-yards discriminated against. McCoy *v.* C., I., St. C. & C. R. Co., U. S. C. C., S. D. Ohio, 13 Fed. Rep. 3.

Where, after the commencement of an action, a third party becomes interested in the litigation by assuming the liabilities of the defendant in respect to the claim plaintiff is seeking to enforce, it is proper to allow a supplemental complaint bringing in such third party as a co-defendant.

Where, therefore, after the commencement of an action against a railroad company upon a contract, it appeared that it and other companies were merged in a new company, the latter having assumed all of the contracts, liabilities and obligations of the original companies, *held*, that an order allowing defendant to file a supplemental complaint bringing in the new company as defendant was properly granted.

Milner *v.* Milner, 2 Edw. Ch. 114; Buchanan *v.* Comstock, 57 Barb. 583; Tiffany *v.* Bowerman, 2 Hun, 643; Wattson *v.* Thibou, 17 Abb. Pr. 184; Pinch *v.* Anthony, 10 Allen, 470, distinguished. Prouty *v.* Lake Shore, etc., R. R. Co., 85 N. Y. 270.

On a bill for relief against a decree obtained by fraud, no relief will be granted if complainant had knowledge of the facts constituting the fraud, and in the exercise of due diligence might have made them known to the court pending the original suit; nor if complainant might, by the use of due diligence, have ascertained the facts and pleaded them in the original suit.

A bill seeking relief from a decree obtained by fraud must allege that complainant had no knowledge of the fraud now alleged, and no notice thereof at the time of the original suit.

Upon the question of notice there is no distinction between the corporation and its officers or stockholders; so, if stockholders were advised of the foreclosure suit, and of the facts now charged as constituting fraud in the execution of the bonds and mortgages sued on in the original suit, and had an opportunity to intervene and defend, and did not do so, the corporation is concluded by their laches.

Where the stockholders having full knowledge of all the facts and an opportunity to move in the original suit before decree, or to file a bill immediately upon the rendition of the decree, failed to do either for a period of four years, and in the mean time the decree had been fully executed, the property sold thereunder to a new company and the sale confirmed, and the stock and bonds of the new company gone into the market, it is too late for them to obtain relief from a decree alleged to have been obtained by fraud. Pacific Railroad (of Missouri) *v.* Missouri Pacific R. R. Co., U. S. C. C., E. D. Missouri, 12 Fed. Rep. 641.

A complaint by an administrator, who is also a child of the intestate, for injuries to his intestate causing his death, which alleges that, by means of such wrong, the plaintiff has sustained damages in a certain sum, but states no facts to show pecuniary loss, present or prospective, resulting from the death, to the widow or relatives of the deceased, does not state a cause of action under the statute. Regan, Adm., *v.* Chicago R. R. Co., 51 Wis. 599.

A petition for a mandamus was filed in one of her courts by the State of Mississippi to compel a railroad company, a corporation existing under the laws of that State, to remove a stationary bridge which it had erected over Pearl River, a navigable stream on the line between Louisiana and Mississippi. Thereupon the company presented its petition, duly verified, praying for the removal of the suit into the Circuit Court of the United States, and alleging that the right to erect, use, and maintain the bridge was vested by the company's charter; that its maintenance over said river was authorized by the act of Congress approved March 2, 1868, 15 Stat. 38; that thereunder it became a part of a post-road over which for several years the mails of the United States have been carried, and that therefore the suit impugns the rights, privileges, and franchises granted by said act. The petition was accompanied by a bond with good and sufficient security, conditioned as required by the act of March 3, 1875. 18 Stat. part 3, p. 471. *Held*, that under the latter act the company was entitled to the removal prayed for.

The decisions of this court affirming the jurisdiction of the courts of the United States in cases arising under the laws of the United States, or where a State is a party, cited and commented on.

The ruling in Insurance Company *v.* Dunn, 19 Wall. 214, and Removal Cases, 100 U. S. 457, that a party loses none of his rights who, after failing to obtain its removal, contests a suit on its merits in the State court, reaffirmed. Railroad Co. *v.* Mississippi, 102 U. S. Reports, 135.

A contract between a railroad company and individuals, that the company will construct a depot at a certain place, and that upon its construction the individuals will pay to the company a certain sum of money, is negotiable by endorsement so as to vest the title thereof in each endorsee successively.

Where such a contract has been signed by a receiver of a railroad company, and suit is brought thereon by the assignee, the authority of the receiver to make such assignment is involved in the question of the execution of the assignment, and can be put in issue only by a denial under oath.

When a party agrees to pay a railroad company a certain sum of money on the completion by the latter of a depot building at a certain place, he is entitled to notice of such completion before suit can be brought to enforce payment under the contract.

A special finding embraces only the facts proved upon a trial, and all issues not determined by the facts found must be regarded as not proven. Vannoy *v.* Duprez, 72 Ind. 26.

The Superior Court may, in its discretion, under the Gen. Sts. c. 43, § 40, set aside a verdict of a sheriff's jury on a petition for damages for land taken for a railroad, where questions of law are reserved at the trial, and fail to be certified to the court by reason of the death of the officer presiding at the trial, and without any fault of the party requesting such questions to be certified; and no exception lies to an order made in the exercise of this discretion. But where a judge does not exercise his discretion, and rules, as matter of law, upon the evidence, that a party is entitled to a new trial, his ruling may be revised by this court on a bill of exceptions. Wamesit Power Co. *v.* Lowell, etc., R. R. Co., 130 Mass. 445.

The city of New Orleans has no power under its charter and the laws of Louisiana to grant to a street railroad company the sole and exclusive right to the use of the public streets of the city for a street railroad.

When the city of New Orleans has made a contract granting to a street railroad company certain franchises to run and maintain a railroad, and binds herself not to grant similar franchises over the same streets to any other company or person during the period of said contract, she is not thereby estopped from granting to others the privilege of running lines across any of the streets mentioned in the contract, nor for such short distances along such streets necessary to make connections and turn-outs for other lines running mainly along other streets and between entirely different termini. New Orleans City R. Co. *v.* Crescent City R. Co., U. S. C. C., E. D. La., 12 Fed. Rep. 308.

An action to recover real property is not within the purview of the act of 1875 (chap. 49, Laws of 1875), authorizing actions to be brought by the people of the State to recover "money, funds, credits and property" held by public corporations, boards, officers or agents for public purposes, which have been wrongfully converted or disposed of; the word "property" associated with the preceding words of specific description in the act is to be construed as referring to property of the same general character.

The said act was not intended to confer jurisdiction to review by means of an action as therein prescribed the proceedings of towns in town meetings or to set them aside upon the allegation that the action of a town meeting was produced by corruption, intimidation, or violence.

Accordingly *held*, that an action by the people was not maintainable under said act to recover lands of a town, the title to which, it

was alleged, had been wrongfully acquired, through the wrongful interference of its servants and agents with the action of a town meeting; they procuring the passage of a vote authorizing the conveyance of the lands for a grossly inadequate sum, by the action of persons not legal or qualified voters. People *v.* New York, etc., R. R. Co., 84 N. Y. 565.

A statute, which obliged several railroad corporations having their tracks in a city to unite in one station, and provided for the discontinuance of some of the existing tracks, and the extension by the city of a street therein, enacted that the city should maintain a suitable track upon the extension of the street, or partly upon the extension and partly upon the discontinued railroad location, to be connected with the tracks of one or more of the railroads in the city, "for the accommodation of the business establishments on the line of said extension which were accommodated by the tracks of" a certain railroad when the act was passed. *Held*, that, after the city had in its discretion constructed a track for the purposes named, this court could not, on a petition for a writ of mandamus, exercise a supervisory power over the mode in which it was done, and determine whether a track in another place would better accommodate the petitioner. Rice, Barton and Fales Machine and Iron Co. *v.* City of Worcester, 130 Mass. 575.

Section 3 of the act of January 16th, 1860 (Acts 1860, p. 52), whereby it was enacted that no street railway should be constructed in the city of St. Louis nearer to a parallel railway than the third parallel street, was not repealed by the act of February 15th, 1864 (Acts 1864, p. 446), nor by the act of March 19th, 1866 (Acts 1865–6, p. 283, art. 4, § 1, clause 51), nor by the act of March 13, 1867 (Acts 1867, p. 62, art. 4, § 1), nor by the act of March 4, 1870 (Acts 1870, p. 463, art. 3, § 1, cl. 5, 9, 16, and art. 12, § 8), nor by article 10, section 1, of the present charter of the city of St. Louis (R. S. 1879, p. 1616). Neither has the municipal assembly of said city the power to repeal said section 3. St. Louis R. R. Co. *v.* South St. Louis R. R. Co., 72 Mo. 67.

The fund in the hands of a county treasurer, arising from a tax voted by a township to aid in the construction of a railroad, where the railroad company has forfeited all right to the same, under section 18 of the railroad aid act of May 12th, 1869, 1 R. S. 1876, p. 736, and sections 1 and 2 of the supplemental act of December 24th, 1872 (Acts 1872, p. 56), it not having been diverted into the township funds, belongs to the township, unless it has been demanded by the taxpayers of the township within two years after the passage of the act of 1872, or within two years after the forfeiture thereof by the railroad company; and such demand, being matter of defence, need not be negatived in the complaint in an

action by a township, against a county, to recover a tax voted by the township. Centre Township *v.* Board of Commissioners of Marion County, 70 Ind. 562.

Under the provision of the constitution, that the legislature cannot authorize a municipal corporation to tax for its own local purposes lands lying beyond the corporate limits, the legislature has power to attach outside territory to the territory of a town and erect the territory so attached, together with the territory of the town, into a district, and authorize the district so formed to vote a subscription to the stock of a street railroad, and issue bonds in payment thereof, and an act to this effect is constitutional. Henderson *v.* Jackson County, U. S. C. C., W. D. Mo., E. D., 12 Fed. Rep. 676.

Section 3, of the act of December 24th, 1872, Acts 1872, p. 56, releases a taxpayer from the payment of a tax voted and levied by a county, under the act of May 12th, 1869, 1 R. S. 1876, p. 736, to aid in the construction of a railroad, where the same had been forfeited by the railroad company.

Act of 1873—Sections 1 and 2 of said act of December 24th, 1872, were, perhaps, repealed by the act of January 30th, 1873, Acts 1873, p. 184.

Act of 1875—Forfeiture by Failure to Complete Road.—Enjoining.—Where a railroad company, to which an appropriation to build its road had been duly voted by a county, and placed upon the duplicate more than three years prior to the passage of the act of March 11th, 1875, Acts 1875, Reg. Sess. p. 121, had failed during all that time either to complete its road, or to obtain further time, such appropriation became forfeited, and the collection of such tax could be enjoined at the suit of a taxpayer. Indianapolis, etc., R. R. Co. *v.* Commissioners of Tipton Co., 70 Ind. 385.

In an action to enjoin the collection of a tax levied as an appropriation to a railroad company, the complaint may set out the proceedings resulting in the levying of such tax, and then, in the same paragraph, state separately each cause of objection to the tax. And then the defendant may demur or plead to each specification of objections, as to separate paragraphs of complaint. Consequently, his motion to cause the complaint to be separated into as many paragraphs as there are such specifications should be overruled.

In such action, the answer set out a copy of a notice of said election, and alleged that legal notice had been duly given by publication and posting. It also set out a copy of the county auditor's certificate that publication had been made, and that he had delivered ten copies of such notice to the sheriff for posting. It also set out the sheriff's return that he had posted such notices at ten public places in the township, three weeks prior to the election.

Held, on demurrer, that such certificate and return sufficiently identify the notice.

An election having been held in each of several townships, having only one voting precinct, as to a proposed appropriation to the same railroad, the inspectors of each township afterward met jointly with the auditor and canvassed the vote of each township.

Held, that, under section 8, of the act of May 12th, 1869, 1 R. S. 1876, p. 736, the inspector and judges of each township, or some two of them, acting only for their own township, were necessary to constitute the legal board of canvassers of the vote thereof.

Held, also, that the fact that the inspectors of the elections held in the other townships aided in canvassing the vote of any such township neither aided nor invalidated such canvass, and that such canvass stood simply as one made by the proper inspector, aided by the county auditor as his clerk.

Held, also, that neither the election nor the tax voted and levied were invalidated by such irregular canvass. Mustard *v.* Hoppess, 69 Ind. 324.

The acts of de facto deputy assessors, in raising the valuation of property listed for taxes, are not rendered invalid because they may have been legally disqualified from acting as deputies by reason of their holding other offices.

When a question of valuation for taxation has been once regularly referred to the proper board of equalization, the valuation of that tribunal is final.

A deputy assessor, who was also a county commissioner, sat as a member of a board of equalization to revise the assessment of property for taxes, to which board the question of valuation was referred on the protest of a taxpayer. *Held*—

1. The action of the board of equalization was not void, the taxpayer not objecting at the time to the deputy assessor constituting a portion of the board, and it not being shown that there was not a quorum of the board without the deputy assessor.

A charge in a petition for injunction to restrain the collection of taxes, that the board of equalization added to the assessment property not owned by the taxpayer, will be disregarded when it is at the same time shown that the amount of taxes first assessed against the taxpayer for the same species of property is not thereby increased by the board of equalization.

The limitation imposed by the constitution of 1876, on the power of counties to levy taxes, applies only to the erection of public buildings. For the purpose of paying the interest and providing a sinking fund to satisfy any indebtedness existing at the adoption of the constitution of 1876, counties are authorized to levy, assess and collect taxes to the necessary amount. Const., art. XI, sec. 6; art. XIII, sec. 9.

Though the tax authorized by act of the 15th legislature (ch. 80, pp. 89, 90) to pay indebtedness to teachers, was one on school districts separately, and not on counties, yet where a tax of one-sixth of one per cent was levied on the entire county, and that was the amount due from each school district after comparing the indebtedness of the district with the amount of its taxable property, the tax, though irregular, was sustained. Texas & Pacific R. R. Co. *v.* Harrison Co., 54 Texas, 120.

This court concurs in opinion with the Supreme Court of Illinois that sect. 5 of art. 9, of the Constitution of that State of 1848 imposes a limitation on the power of the legislature to authorize taxation by the municipal corporations or the political subdivisions of the State.

A congressional township is by the laws of Illinois merely a corporation for school purposes. It cannot, therefore, subscribe for stock in a railroad company, and issue its bonds in payment, nor levy a tax upon persons and property within its jurisdiction, to aid in building railroads. Weightman *v.* Clark, 103 U. S. 255.

A party who, under proceedings to enforce the statutory lien of the State of Tennessee, purchases a railroad does not acquire therewith the immunity from taxation thereon which the railroad company possessed.

Where the case stands on demurrer to his bill, which prays that the collection of taxes on the property be restrained, and avers that the sale was under those proceedings, this court will not, in the absence of a particular allegation to the contrary, presume that the sale embraced anything not covered by that lien. Morgan *v.* Louisiana (93 U. S. 217) cited and approved. Wilson *v.* Gaines, 103 U. S. Reps. 417.

Where a lot is returned by a railroad company in its list as being used for tracks, side-tracks, etc., in connection with the road and for railroad purposes, and the board of equalization assess the same, upon which the taxes are levied and paid, an assessment by the local assessor of the same lot will be a double assessment, and the tax extended upon the latter assessment will be illegal.

Where only a portion of a lot is used for railroad purposes, to that extent it is properly returnable to the board of equalization for assessment, and if any portion is not used as railroad track, and is properly assessable by the local assessor, he should so describe it as not to embrace any portion of that which is assessable as track, and thus avoid a double assessment. Chicago, etc., R. R. Co. *v.* People ex rel., Weber, 99 Ill. 464.

A county treasurer, by public advertisement, called for the payment of a railroad subscription tax, and threatened to enforce its collection by levy and sale. Under this call, a taxpayer paid, un-

der protest, the amount demanded of him, and then brought action for its recovery under the provisions of "An act to facilitate the collection of taxes." 16 Stat. 785. At the trial, the county treasurer testified that he had been forbidden by the comptroller-general to enter these railroad subscription assessments upon the tax duplicate, and that he collected only as agent for the railroad company.—*Held*, that the presiding judge erred in granting a nonsuit. Cade *v.* Perrin, 14 Shand. 1.

The result of a suit for the taxes of particular years is not res judicata in subsequent suits between the same parties for taxes of other years, and the decisions upon legal questions arising in the first case are important only as precedents.

Where a statute requires a corporation to be taxed at a certain rate upon its capital and on loans employed in the State, and the Auditor-General merely computes the amount of the tax on the basis of reports made to him by the company, but without passing judgment upon their correctness, the State is not precluded from enforcing payment of the correct amount.

The State is not concluded by the mere non-action of one of its officers, if he has not ascertained the facts and passed judgment.

Where both parties desire, and the public interest demands, that a court pass upon the merits of a case, and preliminary objections do not go to the jurisdiction, the main case may be disposed of.

A railway company is taxed, not for the face of the bonds upon which it negotiates a loan, but for the amount of the loan.

Stock dividends and issues of stock proportioned to that previously held by shareholders, must stand on the same footing with original stock, and should be taxed as far as it is considered paid in.

The general railroad law, in permitting the consolidation of railroad companies within the State with others beyond its boundaries, contemplates leaving the domestic company in its original position as to stock and loans, and annexing to its capital and loans those additions which are made proportional to the original amounts.

Interest upon money withheld is allowed either because there is an express or implied promise to pay it, or as damages; but no promise can be implied until the principal falls due, and it is not allowable as damages if there has been no final understanding as to how much is to be paid.

Interest upon the amount of a tax which it is claimed should have been paid, cannot be allowed where the amount claimed has never been levied and is not therefore in default. Lake Shore, etc., R. R. Co. *v.* State, 44 Mich. 193.

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THE mode of citation of the volumes of the American and English Railroad Cases will be as follows:

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AGENT.

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2. The law will regard station agents as fully authorized to make contracts for future transportation of property, and there is no necessity for the shipper to prove that the station agent was authorized by the railroad company to make the contract for transportation. Id.

3. S., the regular agent of the defendant at a certain depot, lived three miles from the depot, and T. lived at the depot for two years prior to the bringing of the action, and discharged the duties of agent in receiving and forwarding freight, selling tickets, etc., all of which was done in the name of S. and with the knowledge and acquiescence of defendant. It was *held*, that T. was the agent of defendant, and that defendant was bound by any act of his within the scope of the authority impliedly given. Katzenstein *v.* Raleigh, etc., R. R. Co. 464.

4. Plaintiff, station agent of a railroad company, sues the company in damages for breach of an alleged contract in failing to furnish a train for an excursion. Upon correspondence had, the company supposed the train was intended for a third party and agreed to supply it on certain terms, but afterwards refused on discovering that plaintiff was attempting to procure it for his own benefit. *Held*, that plaintiff could not from his fiduciary relation towards the company enter into a binding contract with it for such purpose, unless it agreed thereto after being fully advised of all the circumstances. Pegram *v.* Charlotte, etc., R. R. Co. 470.

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7. An action may be maintained against a railroad company for injury to stock committed while the company was in the hands of a receiver. Kansas Pacific R. R. Co. v. Ward, 588.

8. A judgment will not be reversed on the ground that it does not appear that the stock was killed within the county. Kansas City, etc., R. R. Co. v. Daughtery, 587.

9. In an action for killing stock the bill of particulars may be amended pending action. Instructions regarding fence held sufficient. Missouri Pacific R. R. Co. v. Ryan, 588.

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CARRIER.

1. Cattle belonging to the plaintiffs were received from the B. and O. R. R. Co. at Baltimore, by the P. W. and B. R. R. Co., to be transported over its road. An action was brought by the plaintiffs against the P. W. and B. R. R. Co., upon the common law liability of the latter as a common carrier, to recover damages resulting from an alleged delay in the transportation of cattle, on the part of the defendant. The declaration alleged that the cattle were received by the defendant on the 28th of July, 1878, about the hour of four o'clock P.M., and were by it detained upon its road in Baltimore until about half-past twelve o'clock A.M., of the morning of Monday, July 29, 1878. On demurrer, it was *held:*

1. That although the declaration did not allege that the cattle were delivered to the defendant on Sunday, it was the duty of the court to notice the days of the week upon which particular days of the month fall; and hence the court knew without other averment that the 28th of July, 1878, was Sunday. And in the regular division of time, Sunday embraces all of the twenty-four hours next ensuing the midnight of Saturday.

2. That the Sunday law, as found in the Maryland Code, art. 30, sec. 178, had no application to the case whatever.

3. That according to the principles of the common law, applicable to common carriers, the defendant, having accepted the stock to be transported over its road in the usual course of transit, it at once became its duty to forward the same without unnecessary delay or detention.

4. That its obligation was to carry, according to its public profession, and the conveniences at its command. And if injury were sustained by reason of any neglect of this duty, or other wrongful act in the carrying and delivery of the cattle, the fact of their having been received to be carried, or having been carried on Sunday, could afford no excuse to the defendant, or exoneration from liability.

5. That the carrying forward of the cattle by the defendant on Sunday was not illegal; it was fairly and justly a work of necessity, and therefore excepted from the operation of the statute.

6. That even upon the supposition that the plaintiffs were violating the law in having their cattle transported on a Sunday, the defendant could not avail itself of such infraction of the law by the plaintiffs, as a defence to an action for the consequences of a wrong or negligence of its own. Phila., etc., R. R. Co. *v.* Lehman, 195.

2. The cattle in question, after being received from the B. and O. R. R. Co., were carried by the defendant over its road to Philadelphia, and there delivered to the P. R. R. Co., by which they were carried to Jersey City Stock Yards, their place of destination. They reached there too late for the market on Monday, and were not sold until Wednesday, which was the next market day. The defendant ran no regular freight trains on Sunday during the summer of 1878. But special trains were run on Sunday for the accommodation of the cattle trade, by an arrangement with the B. and O. R. R. Co.; and the usual course of dealing, as between the two companies, was for the B. and O. R. R. Co. to give notice by telegraph on Saturday, and again on Sunday morning, of what cattle there would be for transportation over the defendant's road during the day of Sunday. *Held:*

1. That it was a question to be submitted to the jury, upon all the proof in the cause, to determine whether according to the ordinary extent and usual course of the cattle trade on Sunday over the defendant's road from Baltimore, and the notice given the defendant's agents of the approach of trains for transportation on Sunday, the 28th of July, the defendant had made reasonable provision, and exerted due care and diligence, to guard against delay in forwarding the cattle trains that might be received from the B. and O. R. R. on that day; or whether upon the receipt of such notice as was given, the requisite means or equipment could have been provided, by reasonable exertion, to take forward the plaintiffs' cattle, without the delay that actually occurred.

2. That if the defendant provided reasonable equipment to meet the requirements of the Sunday's transportation in the usual course, upon the notice re-

CARRIER—*Continued.*

ceived, and the plaintiffs' cattle were carried forward and delivered with due diligence, and as much expedition as was practicable under the circumstances of the case, the defendant was not liable for the unavoidable delay; that is to say, a delay that could not have been avoided by the exercise of reasonable precaution and diligence.

3. But on the other hand, if the day could have been avoided by the use of due diligence, and the making of proper effort to send forward the cattle with ready and convenient despatch, and injury resulted from a failure in that respect, the defendant was liable therefor.

4. That the duty to deliver safely, and the duty to deliver in due time, were distinct obligations. The time of delivery was often a matter of distinct contract; but when, as in this case, there was no express contract, there was an implied obligation to deliver within a reasonable time; and that meant a time within which the carrier could deliver, using all reasonable exertion, and taking all reasonable precaution to avoid delay.

5. That as it was sought to charge the defendant with the consequences of the delay, and the failure to use such degree of diligence in forwarding the cattle as would have secured their arrival at Jersey City in time for the cattle market of Monday, the 29th of July, it was material and necessary that it should be shown that the defendant had knowledge of, or from the circumstances of the case and the course of the trade it might have reasonably been inferred, that the cattle were intended for the market of that day.

6. That it ought to have been submitted to the jury to find whether the defendant had made proper exertions, and used due and reasonable diligence, under all the circumstances of the case to avoid all unnecessary delay in the transportation of the cattle; or whether the cattle could have been carried forward with greater expedition and despatch than they were, by the use of reasonable precaution and diligence on the part of the defendant, under the circumstances in reference to which it was called upon to act.

7. That if the defendant had been guilty of such negligence in the transportation of the stock as to render it liable, it could not relieve itself by showing that a connecting road might have made up for its default.

8. That the mere fact that the plaintiffs' agent had knowledge of what had been done or of what was being done in regard to the cattle, and their destination, could in no manner affect the defendant's liability for failure or neglect in the discharge of its duty as carrier. Id.

3. A railroad company is engaged in a work of necessity when running its trains on the Sabbath to carry passengers, or live stock, or merchandise, if such work is necessary for the public service, and to enable it to discharge its duties and obligations to the public, and to comply with its contracts as a carrier for hire. Commonwealth *v.* Louisville, etc., R. R. Co. 216.

4. Goods belonging to the wife, and consigned to her at Atchison, Kansas, were delivered to a carrier at Chicago by the husband, who had authority to so deliver the same and contract for their transportation. After their delivery to the carrier, they were attached in an action against the husband and taken possession of by an officer, and upon the husband going to the office of the carrier to direct a change of place of shipment, he was informed of the attachment, and after such notice had ample time to assert plaintiff's right to the goods. *Held*, that upon such showing a verdict against the carrier for failure to deliver the goods, pursuant to the contract for their carriage, should be set aside as against evidence. Furman *v.* Chicago, etc., R. R. Co. 280.

5. A common carrier cannot contract for exemption from liability on account of the negligence of itself or its servants. Harvey *v.* Terre Haute, etc., R. R. Co. 298.

6. Where the shipper fixes a stated value upon the article shipped he cannot recover a larger amount. Id.

7. The true owner of personal property may enforce his right to it as against the consignor or consignee or carrier, or other bailor or bailee, whenever he sees fit to do so, before its delivery to the bailee as directed by the bailor. Wells *v.* American Express Co. 298.

CARRIER—*Continued.*

8. A package of money belonging to W. alone, was sent by express directed to W. & C., and, upon W.'s demanding it as sole owner, without any assignment by C. of his apparent interest to W., or written order by C. to deliver to W., or offer of any receipt or acquittance from both, the express company refused to deliver it to W., claiming that the money had been subjected to process of garnishment in its hands. *Held*, that apart from the question of garnishment, W. may recover the full amount of such moneys. Id.

9. An interstate contract of shipment, entered into by a common carrier, is an entire contract, and the laws of the State wherein it is made, so far as they attempt to regulate interstate commerce, do not enter into it as a part of the contract, being repugnant to the federal constitution. Carton v. Ills. C. R. R. Co. 305.

10. Plaintiff purchased a passenger ticket on defendant's road, which entitled him to carry a certain amount of baggage. He had a packing-box or trunk containing merchandise. Upon applying for a check, he advised defendant's agent of this fact, who thereupon refused to check the trunk unless extra compensation was paid for its transportation; plaintiff paid the sum charged; the trunk was destroyed by fire. In a prior action brought to recover for the loss of baggage, the court ruled that plaintiff could not recover for the merchandise as it was not baggage, and a recovery was had for the baggage. In an action brought to recover for the merchandise, *held*, that the former action was not a bar, as the two actions were not for parts of one entire indivisible demand, but were based upon separate contracts. Millard v. Missouri, etc., R. R. Co. 311.

11. Whether the station agents along the line of a railway have authority to bind the company by contracts to furnish cars for the transportation of property is a question of fact and not of law, nor can courts take judicial notice that such agents possess such power, or are held out to the world as possessing it; and it is error to reject testimony offered to prove they have such power. Wood v. Chicago, etc., R. R. Co. 314.

12. The law will regard station agents as fully authorized to make contracts for future transportation of property, and there is no necessity for the shipper to prove that the station agent was authorized by the railroad company to make the contract for transportation. Id.

13. The act of April 20, 1874 (71 Ohio L. 146), giving a penalty of $150 to the party aggrieved by a railroad corporation for overcharging for the transportation of passengers or property, is not in contravention of the constitution. Cincinnati, etc., R. R. Co. v. Cook, 317.

14. A regulation by a railway company by which one who has paid his fare between two points on the road, but desires to stop over at an intermediate point, is required to procure a stop-over ticket from the conductor and present it to the conductor of the train on which he seeks to complete his journey as evidence of his right to do so without further payment, is a reasonable regulation. Yorton v. Milwaukee, etc., R. R. Co. 322.

15. If the passenger, in such a case, asks the proper conductor for a stop-over ticket, and through the conductor's fault receives instead thereof only a trip check, the second conductor may still demand of him the additional fare, and, upon his refusal to pay it, may eject him from the train at some usual stopping place, using no unnecessary force; and such ejection will be no ground of recovery against the company, though such company will be liable to the passenger for the fault of the first conductor. Id.

16. A railroad company made a discount of fifteen cents upon tickets purchased of a ticket agent. Until the time advertised for the departure of the train had expired the ticket agent had been in his office. He left it after that time, and while the train was approaching, to aid the station agent, as he was accustomed to do, in loading the baggage. While the plaintiff did not approach the ticket office to find it vacant and the ticket seller absent until after the time had expired for the departure of the train as advertised, there was sufficient time for him to have purchased his ticket before the train actually started from the station if the ticket seller had then been in the office. He entered the train without a ticket, and the conductor, acting according to the rules of the com-

CARRIER—*Continued.*
pany, demanded the full price for the fare, which the plaintiff refused to pay, insisting upon his right to be carried for the reduced rate, which he tendered, but which the conductor refused. The plaintiff was expelled from the train at the next station. *Held*, that he was properly expelled from the cars; and *held* further, that he was not entitled to purchase a ticket at the station where he was expelled, and demand to be carried on the same train. Swan *v.* Manchester, etc., R. R. Co. 328.
17. Where it is expressed in terms upon a railway ticket that it is not good unless "used" on or before a certain day, a presentation of the ticket and its acceptance of it by the conductor before midnight of that day, although the journey is not completed until the next morning, such facts will be held to be a compliance with the condition. Auerbach *v.* N. Y., etc., R. R. Co. 334.
18. Where the terms of a railway ticket bind the passenger to a continuous journey, such requirement is fulfilled if the passenger commences his journey at an intermediate point. Id.
19. By virtue of sec. 8 of the act of March 9, 1875 (1 Rev. Stat., Indiana, 1876, p. 259), regulating the issuing of railroad tickets and coupons, all special tickets are exempted from the operation of said act whether they are half fare or excursion tickets or special in any other respect. State *v.* Fry, 340.
20. Plaintiff took passage at night on train from Grenada to Torrence. The conductor permitted the train to pass by Torrence without stopping. On reaching the next station the conductor gave to plaintiff an order addressed to the conductor of a freight train, which would pass in a few hours, directing that the plaintiff should be carried back to Torrence free of charge. Plaintiff took the order, but did not avail himself of it. The conduct of the conductor throughout the matter was courteous. *Held*, that a verdict for $2500 which was reduced by the court $833.33 was excessive. Chicago, etc., R. R. Co. *v.* Scurr, 341.
21. Plaintiff with her two children was carried past the station to which she was bound. The conduct of the conductor was courteous and respectful. *Held*, that a verdict for $1000 was excessive. Trigg *v.* St. Louis, etc., R. R. Co. 345.
22. Plaintiffs delivered certain cotton to a despatch company to be carried from Memphis to Liverpool, under bills of lading which contained a clause exempting the company and its connections from liability from loss or damage by fire. The cotton was destroyed by fire in defendant's warehouse at Jersey City. Defendant was not a member of the despatch company, and only occupied the relation of intermediate carrier. *Held*, that defendant was entitled to the benefit of the restrictive clause in the bills of lading, and is exonerated from liability unless the fire resulted from its negligence. Whitworth *v.* Erie R. R. Co. 349.
23. Where bills of lading contain a general exemption from liability for loss by fire, it is incumbent on the owner of the property, in order to avoid the effect of the exemption, to show that the loss resulted from the carrier's negligence, or some breach of duty which contributed to the loss. Id.
24. The goods were detained in defendant's freight-house because of the neglect of the succeeding carrier to receive them, although notified of their arrival. *Held*, that the detention was not defendant's fault, and did not deprive it of the benefit of the exemption clause. Id.
25. In a contract for the transportation of oil to defendant's warehouse, defendant agreed to pay freight on delivery, and assumed all risk and loss of its property by fire while in plaintiff's custody or charge. While on plaintiff's barge at a dock of defendant's warehouse the oil was destroyed by a fire originating from a tank-boat used by defendant. *Held*, that plaintiff could not recover freight for the oil so destroyed; that delivery at the warehouse was essential to performance, and without it or lawful excuse for failure the freight was not earned; that the risk assumed by defendant relieved plaintiff from liability for the destruction of the oil, but did not entitle it to recover freight for oil destroyed before it was actually delivered, and that it could not recover for charges thereon paid to its co-contractor. N. Y., etc., R. R. Co. *v.* Standard Oil Co. 353.
26. A railroad company receiving goods for shipment beyond the terminus of

CARRIER—*Continued.*
its line may, by special contract, protect itself against liability for loss not occurring on its line. And such contract will be presumed from the fact that a clause thus limiting the liability is to be found printed in the bill of lading, even though the shipper's attention was not called to it, if it appears that he had previously shipped like articles and taken like bills of lading. East Tenn., etc., R. R. Co. v. Brumley, 356.

27. The lien of a common carrier on goods transported depends on the contract with the owner. Ordinarily the law implies such lien, and it will be held that, in delivering goods to be carried, the owner assents to the condition that the carrier may retain possession of the goods until his reasonable charges have been paid, although nothing may be said on the subject. But when goods are sent, not according to the contract with the owner, but by some other route, there is no lien for freight money. Nor in case of prepayment of the freight upon contract for through rate. Marsh v. Union Pacific R. R. Co. 359.

28. A common carrier receiving goods from another carrier, with knowledge that a through contract has been made, and the price of transportation to the point of destination paid in advance, can assert no lien on such goods for transporting them over its line. Id.

29. Trover lies for the value of goods illegally withheld under claim of lien for freight money. Id.

30. A consignor of goods, after they have passed from the hands of the railroad company with which the contract of affreightment was made, into the hands of another company, has the same right to change their destination while in transitu, by taking a new bill of lading, as if the first company had a continuous line to the place of destination. Sutherland v. Second Nat. Bank, 368.

31. Such new bill of lading is valid when called in question between a bona-fide holder and one claiming a lien by virtue of an attachment. Id.

32. The service of an attachment upon a railway company creates no lien upon property not within the county at the time it is served. Id.

33. B. R. & Co. sold and shipped to V. R. & H., on the 22d September, 1875, on four months' time, a bill of goods. They telegraphed M. & Bros. to stop the goods. The telegram was taken to the freight agent of the railroad, who promised to do so, and that he would reship them to the sellers, who were notified. The goods were afterwards, by mistake or negligence, delivered to V. R. & H., who failed on the 23d December following. Upon maturity of the account, B. R. & Co. brought suit against V. R. & H., recovered judgment, but failed to make their debt, the property of the debtors being absorbed by prior judgments. B. R. & Co. sued the railroad company for wrongfully delivering the goods. *Held*, the notice was sufficient. There need be no express demand. The notice is sufficient, if the carrier is clearly informed that it is the intention and desire of the seller to exercise the right of stoppage in transitu. Bloomingdale v. Memphis, etc., R. R. Co. 371.

34. It is not required, when the right of stoppage in transitu is exercised, that the buyer should have been declared a bankrupt or insolvent by legal proceedings, or that he should have made an assignment, but insolvency fairly means that the party should be shown to have been unable to meet the debt due the seller, at the time of the exercise of the right, when the debt should fall due. The purchaser may not have actually failed or have gone to protest, but might be hopelessly insolvent. But the objection that the purchaser was not insolvent at the time of the stoppage, can only be taken by the purchaser, and not by the carrier, except that he may show as a matter of defence that the debt could have been made by due diligence. Id.

35. The bringing suit upon the debt when due and recovery of judgment, does not estop the seller from suing the carrier for wrongful delivery. Id.

36. One who passed out of a railway car and got upon the platform thereof, and attempted to step or jump from the car while it was in motion, cannot recover for injuries suffered in consequence thereof, even though he had reached his place of destination, and the train, which had previously stopped to permit passengers to alight, had not so stopped for a reasonable length of time. Jewell v. Chicago, etc., R. R. Co. 379.

CARRIER—*Continued.*

37. Where the railroad does not halt its train at a station a sufficient length of time to enable a passenger, by the use of reasonable diligence, to get off before it is started again, and it is so started while the passenger is in the act of alighting, whereby he is thrown down and injured, the company is liable. Straus *v.* Kansas City, etc., R. R. Co. 384.

38. Where insufficient time is allowed a passenger for safe and convenient egress from the cars, and before he attempts to alight the train is started, and he then jumps from the train while its motion is so slight as to be almost imperceptible, and is injured, it is for the jury to determine, from the age and physical condition of the passenger, whether he is guilty of contributory negligence. Id.

39. If the train is stopped a sufficient length of time for the passenger to conveniently alight, and without any fault of defendant's servants he fails to do so, and the conductor, not knowing and having no reason to suspect that the passenger was in the act of alighting, caused the train to start while he was so alighting, then the company is not liable for the resulting injury. Id.

40. Where the conductor, after allowing a sufficient length of time for passengers to alight, starts the train before the passenger is in the act of getting off, and is therefore guilty of no negligence, and after the train is in motion the passenger who has been dilatory jumps from the train and is injured, he cannot recover. Id.

41. Where the shippers of live-stock over a railroad entered into an agreement with the railroad company, whereby it was stipulated and agreed that the carrier should not be responsible for injury to the stock in consequence of a failure or neglect to water or feed them while in transit, and the carrier negligently carried them beyond the destination to which they were shipped, in consequence of which they were deprived of the attentions of the shippers and their agents, and were without food or water during two days, *held*, the carrier was liable for damages occasioned to the stock thereby. Bryant *v.* Southwestern R. R. Co. 388.

42. Where a person ships cattle over a railway under a special contract of carriage, he cannot elect to charge the railroad company with the liabilities of a common carrier. Lake Shore, etc., R. R. Co. *v.* Bennett, 391.

43. A railroad company is not liable for delay in receiving and carrying goods or in transporting them after they have been received whenever the delay is necessarily caused by unforeseen disaster which human prudence cannot provide against, as by an uncontrollable mob. Id.

44. The fact that a railroad company has reduced the wages of its employés cannot be held to justify or excuse a mob composed of indiscriminate persons in stopping trains and delaying the transportation of goods, nor can the company be held responsible for the consequences of such unlawful proceedings when they cause such delay. Id.

45. Damages cannot be recovered in an action of contract for improper arrest of a passenger for attempting to use a ticket purchased of the company's agent. The action should be of tort. Murdock *v.* Boston, etc., R. R. Co. 406.

46. Where, for a consideration, a railroad company undertakes to transport a passenger from one point of its line to another, there arises an implied contract on the part of the company that it has, for that purpose, provided a safe and sufficient road, and that its cars are safe and trustworthy. Phila., etc., R. R. Co. *v.* Anderson, 407.

47. Where a passenger is injured by an accident arising from a collision, or a defect in the machinery or roadway, he is required, in the first place, to prove no more than the fact of the accident and the extent of the injury; a prima-facie case is thus made out, and the onus is cast upon the carrier to disprove negligence. Id.

48. This prima-facie presumption may be overthrown by proof, to the satisfaction of the jury, that the injury complained of resulted from inevitable accident, or from something against which no human prudence or forethought could provide. Id.

49. Where an accident occurs by reason of the washing away of an embank-

CARRIER—*Continued.*

ment of a railroad because of insufficient drainage, the company will not be relieved of liability by the fact that the road was constructed under the supervision of a competent engineer, and that the drainage at the point of the accident was provided for in a manner directed and approved by him. Id.

50. The fact that the defendant is the lessee of the road does not relieve it from the consequences of its own negligence, and it was bound to see that the road, whether owned or leased, was safe and sufficient between the points named on the passenger's ticket. Id.

51. Where freight is carried over connecting railroads, each road is liable for loss or injury occurring through its own negligence, even although the first carrier may also by express contract have assumed a responsibility for losses occurring on the lines of succeeding carriers. Aijen *v.* Boston, etc., R. R. Co. 426.

52. Where the contract of a common carrier contemplates the employment of a connecting carrier to complete the transportation, the mere reception of the property by the latter will create sufficient privity between it and the shipper to enable him to maintain an action against it on the contract, and in such case the connecting carrier will be entitled to the benefit of all valid limitations upon the carrier's liability provided in the contract; but in order to avail itself of them, they must be specially pleaded. Halliday *v.* St. Louis, etc., R. R. Co. 483.

53. While it is true that a railroad carrier may by contract restrict its liability to its own line, there is no doubt that it may also extend its liability beyond its own line. St. Louis, etc., R. R. Co. *v.* Larned, 496.

54. So, where a railroad company in its own wrong shipped a lot of cotton from its depot in Arkansas, to Waterville, in the State of Maine, beyond the terminus of its road, and on the application of the agent purchasing the cotton, gave him a bill of lading containing a printed stipulation restricting its liability to its own line of road, naming the number of bales, and containing this entry, written in a blank: "To be forwarded from Waterville, Maine (where the cotton is now lying), at consignee's expense. All charges for transportation to that point and necessary charges to be paid by him,"—and the oral evidence showed it was to be transported to Putnam, Connecticut, it was *held*, that the company was liable to the assignee of the bill of lading, the consignee, for the value of the cotton, on account of its non-delivery at Putnam. Id.

55. An agent for eastern parties bought cotton in Arkansas, which he left at defendant's railroad depot, taking receipts for the same, but gave no orders for its shipment, and the railroad company, without any authority from such agent, shipped the same to Waterville, Maine, where another company—the Maine Central R. R. Co.—delivered the same to a person who was not in fact entitled to it. On learning the facts the defendant railroad gave a bill of lading, agreeing to transport the cotton to the person who was entitled to it, in Connecticut, at the consignee's cost and expense; which was not done, the person receiving the cotton refusing to give it up, claiming it was bought for him. The agent drew a draft on his principal, to which he attached the bill of lading, properly assigned, which was paid by the principal, and the latter brought suit against the defendant railroad for the value of the cotton, and recovered. It was contended that the consignee should have sued the Maine Central R. R., and not the defendant. *Held*, that while he might have waived the defendant's contract, and have sued the other company for a conversion, or the person receiving the cotton, he was under no obligation to do so, and that the recovery against the defendant was warranted. Id.

56. While it may be that property in the adverse possession of another is not transferable so as to pass the title, yet where a railroad company gives a bill of lading reciting that the property is then lying in a depot at a certain place, and agrees to forward the same to the consignee, and others advance money on the faith of such bill of lading, which is assigned by the shipper, the railroad company will be estopped, as against such persons, from showing that at the time of giving such bill of lading, and its indorsement, the goods were in the adverse possession of another person, so as to defeat an action brought by the consignee in advancing money on the bill of lading. Id.

57. Section 3064 of the Georgia Code, providing that the last of a connecting

CARRIER—*Continued.*

line of railroads over which goods are shipped which receive them as in good order is liable to the consignee, does not apply to baggage of a passenger checked and accompanying him on his passage. Wolff *v.* Central R. R. Co. 441.

58. Where a passenger with a through ticket over a connecting line of railroads checks his baggage at the starting point through to his destination, and upon arrival it is damaged or has been broken open and robbed, he may sue the railroad which issued the check, or he may sue the road delivering the baggage in bad order. Id.

59. That under the American authorities each of the roads composing such a continuous line over which a passenger travels on a through ticket, and baggage is sent on a through check, is a principal contractor, adopting the contract of the first road, and is therefore liable for spoliation of baggage, irrespective of the point at which it actually occurred. Id.

60. Are such roads also jointly liable as partners or joint contractors? Id.

61. In the absence of special contract, a common carrier receiving a parcel marked to a point beyond its route, but having no special business relationship with the carrier on the connecting line, is responsible, as such carrier, only for safe and seasonable delivery at the end of its own route to the carrier next in the line of transportation. Hadd *v.* U. S. Ex. Co. 443.

62. In case of money delivered to the agent of an express company to be sent to a place beyond the route of the company, it appeared that plaintiff paid charges through, and received a receipt for the money to be sent containing a memorandum of such payment. *Held*, that on the facts, q.v., there was not a special contract to carry to destination. Id.

63. The receipt contained a clause limiting the liability of the company to the risks of carriage to the end of its route. The consignor could not read, and the agent read the principal part of the receipt to him, but did not read that clause. *Held*, that as that clause was expressive only of the company's liability under the law, the omission to read it was no fraud on the consignor. Id.

64. Such a receipt, like any simple receipt, may be explained by parol evidence. Id.

65. On November 12th a railroad received certain boxes of tobacco to be carried from Atlanta to Macon; they reached the latter place on November 15th, and under an agreement between the consignee and the carrier, they were set aside by the latter in its depot to be sold and the proceeds used to pay past-due freights, it being agreed that the balance, if any, should go to the consignee. He did not receive the boxes and then turn them over, nor did he assign the bill of lading, nor was the freight paid. On December 12th the consignors sought to stop the boxes in transitu, and failing to obtain them on demand, sought to recover against the carrier. *Held*, that no actual delivery had taken place so as to prevent a stoppage in transitu. Macon, etc., R. R. Co. *v.* Meador.

66. Can a carrier purchase the title of a vendee and set it up against the vendor's right of stoppage in transitu? Quære. Id.

67. Goods bought and paid for were delivered to a railway company, whose bill of lading was executed to the vendor acknowledging the receipt of the goods to be conveyed to the vendee. *Held*, that the contract for transportation is in legal effect with the vendee, and the company liable to him for non-delivery of the goods. In such case the title vests in the vendee purchaser, and a delivery of the goods to the carrier is a delivery to the purchaser himself. Gwyn *v.* Richmond, etc., R. R. Co. 452.

68. Where one through his agent sells goods to another, and they are shipped to the purchaser, the agent has no right to stop the goods in transitu because his principal owes him on account of money advanced in the purchase of the goods. Id.

69. As a general rule and under ordinary circumstances, it is the duty of a railroad company to provide every passenger with a seat, and that if a passenger exercising reasonable care and prudence is injured in consequence of the company's neglect of duty in this regard, the latter must respond in damages. Camden, etc., R. R. Co. *v.* Hoosey, 454.

CARRIER—*Continued.*

70. In an action against a railroad company, where it was in evidence that S., the regular agent of the defendant at a certain depot, lived three miles from the depot, and that T. lived at the depot for two years prior to the bringing of the action, and discharged the duties of agent in receiving and forwarding freight, selling tickets, etc., all of which was done in the name of S. and with the knowledge and acquiescence of defendant; it was *held*, that T. was the agent of defendant, and that defendant was bound by any act of his within the scope of the authority impliedly given. Katzenstein v. Raleigh, etc., R. R. Co. 464.

71. The plaintiff, a fish merchant, signed a contract by which, in consideration of the defendants, a railway company, carrying his fish at a rate one fifth less than the ordinary rate, he agreed to free the defendants from "all liability for loss or damage by delay in transit or from whatever cause arising." Owing to pressure of business the fish of the plaintiff and others was some hours late in starting, and reached London too late for the market. *Held*, that, as the defendants carried at alternative rates, the condition was just and reasonable, although it was absolute and contained no exception, and would in the absence of alternative rates have been unjust and unreasonable. Brown v. Manchester, etc., R. R Co. 481.

72. A railroad has no right to exclude colored passengers holding first-class tickets from their first-class cars. Gray v. Cincinnati, etc., R. R. Co. 588.

73. Liability of carrier on through bill of laden. Harding v. International Nav. Co. 588.

74. Through tickets. Right of holder to transfer. Hudson v. Kansas Pacific R. R. Co. 588.

75. A passenger entitled to transportation under a special contract must provide himself with the proper evidence of it. He has no right to oblige the conductor to use force in expelling him. Hall v. Memphis, etc., R. R. Co. 589.

76. A carrier cannot exempt himself by contract from loss occasioned by his negligence. Amer. Ins. Co. v. St. Louis, etc., R. R. Co. 589.

77. A railroad is liable for injuries to a passenger when occasioned by the negligence of a corporation which furnishes it with motive power. Keep v. Indianapolis, etc., R. R. Co. 589.

78. A carrier is not liable for loss occasioned by the forgery of the shipper in raising the bill of laden. Lehman v. Central R. R. Co. 590.

79. Plaintiff held entitled to payment for articles purchased by him, his trunk having been mis-sent and temporarily lost. Millen v. Brash, 590.

80. Goods were sent a route other than that directed by shipper. *Held*, that the carrier had no lien for freight. The market value of goods at place of conversion is the true measure of damages. Marsh v. Union Pacific R. R. Co. 591.

81. Defendant assumed that the stock was delivered in good order and received by the plaintiff without objection or notice from him that it was otherwise. *Held*, on demurrer, that the answer was not good in confession and avoidance. Ohio, etc., R. R. Co. v. Nickless, 591.

82. What it is necessary to show to recover the penalty in Iowa for discrimination in rates of freight. Paxton v. Illinois, etc., R. R. Co. 591.

83. Penalty for travelling without payment of fare. Regina v. Paget, 591.

84. Railroads must use every test recognized by experts as regards their motive power. Robinson v. N. Y., etc., R. R. Co. 592.

85. Compensation for carrying mail as regards two carriers. Railroad Co. v. U. S. 592.

86. The railroad agent signed a bill of laden for goods not delivered. *Held*, that the carrier was not estopped to show that no goods had been delivered, and that the agent acted outside the scope of his authority. Robinson v. Memphis, etc., R. R. Co. 593.

87. A carrier has no right to deliver goods at their destination to a general agent of the consignor, the consignee not residing at the place. Wilson Sewing Machine Co. v. Louisville, etc., R. R. Co. 593.

88. A railroad has no right to make discriminations in rates of freight based upon amount shipped. Hays v. Penna. Co. 594.

CARRIER—*Continued.*

89. Railroads cannot bind themselves to deliver to a particular stock yard all live stock coming over its line. McCoy v. Chicago, etc., R. R. Co. 621.

90. Partnership between common carriers for a special lot of freight considered. Silver v. St. Louis, etc., R. R. Co. 601. See Agent, 1–3. Pleading and Practice, 58.

CHARTER.

1. Citizenship of railroad chartered in three States. Johnson v. Phila., etc., R. R. Co. 620.

2. The act incorporating the L. and N. R. R. in Tennessee held to be simply a license to act under its Kentucky charter. Callahan v. Louisville, etc., R. R. Co. 594.

CHILDREN.

See Negligence, 13–16, 55.

CITY ORDINANCE PROHIBITING THE USE OF RAILROAD SIGNALS, 79.

See Pleading and Practice, 16–19.

CLAY, RED OF, WHEN CONSIDERED AS A MINE, 555.

See Eminent Domain, 10.

CO-EMPLOYERS.

See Master and Servant.

COLORED PASSENGERS, 588.

See Carrier, 72.

COMMISSIONERS.

See Railroad Commissioners.

COMMON CARRIER.

See Carrier.

CONNECTING LINES.

See Carrier, 51, 52–64.

CONTINUOUS JOURNEY, 334.

See Carrier, 18.

CONSIGNEE.

See Carrier.

CONSIGNOR.

See Carrier.

CONSTITUTIONAL LAW.

1. Sec. 2 of Ch. 81, Kansas Laws of 1889 (Sec. 38, Ch. 84, Comp. Laws 1879), is a nullity, being in violation of Sec. 16, Art. 2 of the constitution of the State Missouri, etc., R. R. Co. v. Long, 254.

2. An act of the State legislature, whose object and purpose is to control and regulate the shipment of freight to points in other States, is in violation of article 1, § 8 of the constitution of the United States, as being legislation on interstate commerce—a subject which is in its nature national, and requiring the exclusive legislation of Congress. Carton v. Illinois Central R. R. Co. 160.

3. An interstate contract of shipment, entered into by a common carrier is an entire contract, and the laws of the State wherein it is made, so far as they attempt to regulate interstate commerce, do not enter into it as a part of the contract, being repugnant to the federal constitution. Id.

4. A contract is subject to the laws of the State wherein it is made and which are applicable thereto.

A State may enact statutes regulating charges on shipments of goods, unless they should be found to be in conflict with the constitution of the United States

CONSTITUTIONAL LAW—*Continued.*

as a regulation of commerce, and in the absence of any legislation by Congress upon the subject, such laws cannot be regarded as an encroachment upon the authority of the general government. Id.

5. Such regulations of commerce only as impose burdens and restrictions are forbidden to the States by the constitution of the United States, but laws which aid in securing expeditious and cheap transportation, and which remove burdens, impediments, and restrictions imposed on commerce by common carriers through unnecessary delays, and by their unreasonable and unjust exactions and discriminating charges, are not regulations of commerce within the contemplation of the constitution of the United States. Id.

6. The Act of April 20, 1874 (71 Ohio L. 146), giving a penalty of $150 to the party aggrieved by a railroad corporation for overcharging for the transportation of passengers or property, is not in contravention of the constitution. Cincinnati, etc., R. R. Co. v. Cook, 317.

See CROSSING, 1; SUNDAY, 1, 2.

CONTRACT.

1. When the public interest is brought in conflict with the private interests of a railroad company, or with the interests of private individuals with whom such company may deal, such private interests must yield to that of the public. A contract resting in part upon an illegal consideration is totally void. So, when the defendants executed to the plaintiff railroad company a bond, one of the conditions of which was that said company was not to lay down a side track at a certain town through which the railroad passed, this condition is construed to be a consideration inseverable from the other considerations upon which the entire contract rested, and such consideration being held illegal as against public policy, and void, the contract will not be enforced, nor a recovery had upon breach thereof. Pueblo, etc., R. R. Co. v. Taylor, 474.

2. No decree should be entered or order allowed for the specific performance of a contract, where there is not a mutuality of remedy between the parties obtainable from the court. The court will not allow an injunction to compel the specific performance of continuous covenants with intricate detail, running through a period of nine years, over a vast system of railways, unreasonably taxing the time, attention, and resources of the court and its officers, and interfering in the general administration of justice. Courts ought not to favor a monopoly in the accommodations which are necessaries to the travelling public, or foster it by the invention or application of extraordinary or unusual orders or remedies. Pullman Palace Car Co. v. Texas and P. R. R. Co. 617.

3. A contract between a railroad and individuals, that the company will construct a depot at a certain place, and that upon its construction the individuals will pay to the company a certain sum of money, is negotiable by endorsement so as to vest the title thereof in each endorsee successively. Vannoy v. Duprez, 693.

4. Carrier's lien for freight charges depends upon, 359.

See CARRIER, 27.

5. A common carrier cannot contract for exemption from liability on account of negligence on its part, 203.

See CARRIER, 5.

6. Extra work done upon promise of payment by the company must be sued for separately, and not under original contract. Hinkle v. San Francisco, etc., R. R. Co. 385.

7. Contracts invalid for want of corporate powers, remain as foundation of rights acquired. Taylor v. South., etc., R. R. Co. 602.

——— FOR TRANSPORTATION.

See CARRIER, 11, 12.

CONTRACTOR.

A corporation is not liable for his labor debts. Bottomley v. Port Huron, etc., R. R. Co. 605.

CORPORATION.

1. The plaintiff company was constituted by seven persons signing the memorandum of association. Afterwards they all were summoned to attend a meeting, but only four attended, and they elected three directors. These three elected three other directors. The three original directors resigned, and afterwards one of the remaining directors sent in his resignation. The defendant then applied for fifty shares. The two remaining directors resolved that fifty shares should be allotted to the defendant, that he should be appointed a director, and that the resignation of the retiring director should be accepted. The defendant afterwards attended a meeting of the directors, confirmed the allotment to himself, and joined in passing a resolution that the shares allotted to himself should be paid up in full forthwith. The defendant subsequently withdrew his application, and refused to pay the amount of the shares allotted to him. By the articles of association the number of the directors was to be not less than three, and any casual vacancy occurring in the board might be filled up by the board, and the continuing board might act notwithstanding any vacancy in their body. *Held*, that the defendant was liable to pay the amount of the shares. York Tramways Co. *v.* Willows, 492.

2. A bill by a holder of a part of the floating debt of the old company, charging that the plan of reorganization is fraudulent as against the creditors of the old company, and seeking to have the stock of the new company, provided in the agreement to be issued to the stockholders of the old company, placed in the hands of a receiver and sold, and the proceeds applied to the payment of the plaintiff and such other creditors as should come in and be made parties, will be dismissed for want of equity. Hancock *v.* Toledo, etc., R. R. Co. 614.

3. A corporation under the laws of one State becomes a citizen of that State, although the same persons, by the same corporate name, have been incorporated with the same powers and the same objects by another State. Such an act of incorporation must be construed as only a license. It is privileged to sue in the U. S. Courts. Missouri, etc., R. R. Co. *v.* Texas, etc., R. R. Co. 596.

4. Reorganization of company. Rights of creditors as against action of one creditor. Washington City R. R. Co. *v.* Southern, etc., R. R. Co. 608.

5. The meaning of the word control, as regards acquisition of future lines, defined. Pullman Palace Car Co. *v.* Missouri Pacific R. R. Co. 597.

6. A corporation cannot claim the benefit of expenditures made by a lessee of a portion of its route, such not being such a user of its franchise as is contemplated by its charter. Brooklyn, etc., R. R. Co., in re. 596.

7. Corporate existence, when constituted. S. and A. R. R. Co. *v.* Ezell, 605.

8. Corporate property. Taylor *v.* South., etc., R. R. Co. 602.

See CHARTER, CONTRACT, 1; DEED, 1.

COUNTY ROAD.

See HIGHWAYS.

CROSSING.

1. Railroad crossings under the Texas Constitution considered. Missouri, etc., R. R. Co. *v.* Texas, etc., R. R. Co. 597.

See ANIMALS, 10; HIGHWAYS, NEGLIGENCE, 13–44, 49, 56, 57, 60, 63, 65; PLEADING AND PRACTICE, 4, 6, 8–12, 16–19, 21.

DAMAGES.

See ANIMALS, CARRIER, 20, 21; NEGLIGENCE, 70; PLEADING AND PRACTICE, 31, 33, 38, 62.

DANGEROUS FREIGHT, 161.

See NITRO-GLYCERINE, 1.

DAYS OF THE WEEK. COURTS TAKE JUDICIAL NOTICE OF THE DAYS OF THE WEEK ON WHICH PARTICULAR DAYS OF THE MONTH FALL, 194.

See CARRIER, 1, 2.

DEAF AND DUMB.

See NEGLIGENCE, 3, 4, 17, 32.

DEED.

A deed in proper form, and given in good faith for value, must be shown to make valid, under Michigan act, 1875, the conveyances by corporation. Marquette, etc., R. R. Co. v. Atkinson, 596.

DEPUTATION, 397.

See CORPORATION, 2.

DIRECTOR.

See CORPORATION.

DISTRICT PERSON, 11.

See NEGLIGENCE, 7-12.

DISTRICT DOMAIN.

1. A railway company having intersected the lands of two adjoining landowners, A. and B., by an embankment, proposed to connect the several portions of A.'s land by an arch through the embankment, and to give B. a right of way through the same arch, which they proposed to connect with his land by an occupation road carried through A.'s land. The strip of A.'s land proposed to be taken for this road was included in the lands delineated. A. objected to this arrangement as being beyond the powers of the company. *Held*, that the company had power to take the strip of land compulsorily for the proposed purpose. Wilkinson v. Hull, etc., Co. 504.

2. The 6th section of the Scotch Railways Clauses Act of 1845 (similar in the English Act) provides, inter alia, that the railway "company shall make to the owners and occupiers of, and all other parties interested in, any lands taken, . . . or injuriously affected by the construction thereof, full compensation for the value of the lands so taken, and for all damage sustained by such owners," etc. And it then cites the Lands Clauses Consolidation (Scotland) Act, 1845, as the machinery by which compensation is to be adjudged. Caledonian Ry. Co. v. Walker's Trustees, 518.

3. In order to found a claim for compensation under this section, some special or peculiar damage must be done to the lands by reason of the construction of the works, which diminishes the value of the lands, which damage would have been the subject of an action at law before the statute. Id.

4. Where, therefore, an access to private property by a public highway or private way is interfered with by the construction of the works, and the value of the property, irrespective of any particular use which may be made of it, is so dependent upon the existence of that access as to be substantially diminished by its obstruction, then the owner is entitled to compensation for such interference. Id.

5. But no compensation is given for damages if the thing done was one for which, if done without any statutory power, no action could have been maintained; nor when a right of action, which would have existed if the works had not been authorized by statute, would have been merely personal; nor when damage arises, not out of the execution, but only out of the subsequent use of the works; nor for the loss of trade or custom by reason of a work not otherwise affecting the house in or upon which the trade has been carried on. Id.

6. Trustees were possessed of a spinning mill ninety yards from an important main thoroughfare in Glasgow, having parallel accesses on the level from two sides of the mill to the thoroughfare. Id.

7. A railway company under their special act cut off entirely one access, substituting therefore a deviated road over a bridge with steep gradients. And the other access they diverted and made less convenient. But none of the operations were carried on ex adverso the premises. When the Bill was before Parliament the trustees were induced to withdraw their opposition in consideration of an agreement, by which the company undertook, that in the event of the land of the trustees and of others being injuriously affected by the construction of any of the works proposed by the bill, their claim to compensation should

not be barred by reason of the company not taking part of their land. The trustees claimed compensation for the diminished value of their premises by reason of the detour and gradients:—

Held, affirming the decision of the court below, that though the agreement gave no right to compensation, the trustees were entitled to it under the Railways and Lands Clauses Consolidation (Scotland) Acts, 1845. Id.

8. Per LORD SELBORNE, L.C.:—The obstruction of access to a private property by a public road need not be ex adverso, but it must be proximate and not remote or indefinite to entitle the owner of that property to compensation for the loss of it. Id.

9. And—It is a question whether a mere change of gradient alone would be a proper subject for compensation. Id.

10. The word "mines" in the 77th section of the Railways Clauses Act, 1845, includes minerals whether got by underground or by open workings; and therefore a bed of clay, on which the railway had been made, was as a mine excepted out of the conveyance of the land to the railway company, and might, unless the company were willing to make compensation to the land-owner, be dug and worked by him. Midland Ry. Co. *v.* Haunchwood, etc., Co. 555.

11. A railway company having the usual power to purchase lands under its special act has, by virtue of the 6th section of the Lands Clauses Act, 1845, power also to purchase the minerals under those lands compulsorily at any time before the expiration of the time limited for the exercise of its compulsory powers, if it should deem it advisable. Errington *v.* Metropolitan, etc., Ry. Co. 562.

12. That power is not taken away by the 77th and following sections of the Railways Clauses Act, 1845, which are for the benefit not of the mine owner but of the company, and only exempt the company from the obligation of buy-the minerals at once together with the surface lands. Id.

13. The words "expressly purchased" in the 77th section are not to be confined to "purchased by agreement." Id.

14. There is no distinction between the severance of ownership vertically, that is, of the surface lands from the mines beneath, and the severance of ownership laterally by the taking by successive purchases of surface lands from the same land-owner. So a railway company having already acquired surface lands may subsequently purchase compulsorily the minerals under those lands. Id.

15. The opinion of the company's engineer, if bona fide, is the only evidence required by the court as to the necessity or propriety of any purchase, and the onus of proving want of bona fides rests upon the party opposing the purchase. Id.

16. Evidence held to show that an agreement to convey right of way was executed upon certain conditions that were never complied with, and to present no proper cause for specific performance. Hastings and Avoca R. R. Co. *v.* Miles, 606.

17. Where a jury is required merely to determine the damages or compensation for taking property, a finding in general terms is sufficient, and it need not specify the amount allowed for each item of injury. And, unless there are indications to the contrary, the presumption is that all evident facts bearing on the amount of damages were taken into account. Michigan, etc., R. R. Co. *v.* Barnes, 608.

18. An inquest of damages for lands condemned for railway uses may be conducted by a jury without legal assistance, and liberal practice in the admission or rejection of testimony is allowable; and the conclusions of the jury thereon will not be disturbed except for rulings that were manifestly inaccurate and did substantial injustice. Id.

19. Liability for interest on deferred payment for land condemned. In re Pigott, etc. 608.

20. Where a railway company has given notices to treat to a legal tenant for life under a settlement and to the trustees of the settlement who have a bare power of sale with his consent, and the purchase-money for the life estate is fixed as between the company and the tenant for life by award under a refer-

EMINENT DOMAIN—*Continued.*

ence to arbitration under the Lands Clauses Act in the usual way, the trustees taking no part in the reference, the company cannot require the sale to be completed as a sale by the trustees, but it must be completed as a sale by the tenant for life under the act. In re Pigott, etc. 608.

21. Without a deed a railroad location can never become legal except on payment or waiver of the land damages, or by prescription. In no other way can the company acquire legal, permanent possession. Perkins v. Maine, etc., R. R. Co. 608.

22. Occupying land without paying compensation a trespass. Evidence of land-owner's consent. Ineffectual proceedings to condemn. Rusch v. Milwaukee, etc., R. R. Co. 609.

23. The reversal of a judgment condemning land for right of way, on appeal by the land-owner, will not divest the possession of the corporation lawfully obtained by giving the statutory bond on the taking of the appeal, nor can the owner maintain ejectment. St. Louis, etc., R. R. Co. v. Karnes, 610.

24. Where the owner of land adjoining a railway, under an agreement with the company, erected a fence along the line, and took upon himself to maintain it, *held*, that as between such owner, and those holding under him with knowledge, the duty of maintaining and repairing the fence did not rest on the company. St. Louis, etc., R. R. Co. v. Washburn, 610.

25. The defendant, in consideration of the grant of a right of way, agreed to build a wagon-road, and also to fence; *held*, that the plaintiff was entitled to recover what it would reasonably cost to construct the road and fence. Taylor v. North P. C. R. R. Co. 610.

If proceedings are instituted to condemn, and after the value of the property is ascertained by inquest, the proceedings are abandoned, the corporation will be answerable for all damages. Leisse v. St. Louis, etc., R. R. Co. 610.

26. Petition for damages. Massachusetts Practice. Wamesit Power Co. v. Lowell, etc., R. R. Co. 688.

27. If the owner is disseised while in possession, he may maintain an action for trespass. Murray v. Fitchburg R. R. Co. 690.

28. Land of one railroad necessary to its use cannot be appropriated by another company. L. S., etc., R. R. v. N. Y., etc., R. R. Co. 607.

29. A right of way may be reserved in a conveyance as effectually as by a grant by deed. A right of way is incident to the land and cannot be separated from it. Koelle v. Knecht, 607.

30. An agreement to release land included in the location of a railroad held within the statute of frauds. Barnes v. Boston, etc., R. R. Co. 606.

See LAND GRANT.

EMPLOYERS, EVIDENCE OF.

See PLEADING AND PRACTICE.

ESTOPPEL, 496, 598.

See CARRIER, 56, 85.

EXCURSION TICKET.

See CARRIER, 19.

EXEMPTION FROM LIABILITY, 293.

See CARRIER, 5.

EXPERTS, 120.

See PLEADING AND PRACTICE, 38, 40.

EXPULSION FROM CARS, 822.

See CARRIER, 15.

FARE, AVOIDING PAYMENT OF, 591.

See CARRIER, 88.

FENCES, 580.
See ANIMALS, 2, 11.

FELLOW-SERVANT.
See MASTER AND SERVANT.

FIDUCIARY RELATIONS, 470.
See AGENT, 4.

FIRES.
As to destruction of property by fire, occasioned by sparks from the locomotive, see Kansas, etc., R. R. Co. *v.* Owen, 611; Loring *v.* Worcester, etc., R. R. Co. 611; Simpson *v.* East Tennessee, etc., R. R. Co. 611. By a lamp left in a freight house, Wood *v.* Chicago, etc., R. R. Co. 612.
See CARRIER, 22, 25; NEGLIGENCE, 66.

FLAGMEN, 80.
See NEGLIGENCE, 28, 36; PLEADING AND PRACTICE, 4–6.

FLYING SWITCH, 114.
See NEGLIGENCE, 44.

FORGERY OF BILL OF LADEN, 590.
See CARRIER, 77.

FREIGHT, DANGEROUS CHARACTER OF, 161.
See NITRO-GLYCERINE, 1.

——— **DISCRIMINATION IN RATES**, 591, 594.
See CARRIER, 81, 87.

——— **DELIVERY OF**, 593.
See CARRIER, 86.

——— **VALUE OF, HOW PROVEN**, 359.
See PLEADING AND PRACTICE, 53.

HALF-FARE TICKET, 340.
See CARRIER, 19.

HELPLESS PERSON ON THE TRACK, 11.
See NEGLIGENCE, 7–12.

HIGHWAYS.
1. The Kansas statutes devolve upon railroad companies the duty whenever they cross a highway to restore it to its former state, or to such a state as not to have necessarily impaired its usefulness, but no duty is imposed thereby upon the companies to keep the highway in repair. When the highway has been fully restored to its former condition, the railroad company is under no obligation thereafter under said section to maintain a sufficient and safe crossing. Missouri, etc., R. R. *v.* Long.
2. A way generally travelled by the public for more than fifteen years as a public road, but not regularly laid out under the provisions of any statute, or of public record as a highway or street by dedication, is not within the terms of Sec. 1, Ch. 105, Laws of 1876. Id.
3. Sec. 1, Ch. 105, Laws of 1876 (Sec. 41, Ch. 84, Comp. Laws 1879), provides it shall be the duty of each and every railway company or corporation owning, controlling or operating any line of railroad within the State to construct and keep in repair at each crossing of "any regularly laid out public highway" a good and substantial crossing. *Held*, that the words "any regularly laid out public highway" do not apply to roads which have become such by use merely. Id.

HIGHWAYS—*Continued.*

4. A town is not liable for neglect to repair a bridge which a railroad is by law bound to keep in order, although the bridge is part of the highway. Rose v. Somerville, 596.

5. The right of railroads under the New York statutes to cross certain highways, considered. Stranahan v. Sea View R. R. Co. 599.

6. A private switch not a public highway. Koelle v Knecht, 607.

See NEGLIGENCE, 30.

HORSE, RUNAWAY, INJURY TO DRIVER OF, AT RAILWAY CROSSING, 35.

See NEGLIGENCE, 19.

INJURIES TO PASSENGERS.

See CARRIER, NEGLIGENCE, 45, 46.

INJURIES TO LAND.

Farmers' L. & T. Co. v. Green Bay, etc., R. R. Co. 604.

INSENSIBLE PERSON LYING ON THE TRACK. COMPANY LIABLE FOR INJURY TO, 11.

See NEGLIGENCE, 7–12.

INTERVENING CAUSE, 41.

See PLEADING AND PRACTICE, 9.

INTERROGATORIES, ANSWERS TO, 84.

See PLEADING AND PRACTICE, 9.

JUDGMENT NON OBSTANTE, 84.

See PLEADING AND PRACTICE, 20.

JUMPING FROM CARS.

See CARRIER, 36; NEGLIGENCE, 75.

JURY.

The record showed that after the jury had retired and had been deliberating on their verdict for about nine hours, the court, without the knowledge or consent of the appellant, caused the jury to be informed, through the bailiff having them in charge, that if they did not agree on a verdict the court would keep them there until Saturday night, a period of four days, to which action of the court the appellant at the proper time excepted. This action of the court cannot be justified. It constituted, as it must have been intended that it should, a kind of coercion on the jury, which was inconsistent with their proper independence. Terre Haute, etc., R. R. Co. v. Jackson, 178.

LAND GRANTS.

1. Where the limits of two land grants made in the same act overlap, and there is an expressed priority in the disposition of such lands, or provision for the same, held that each of the two railroads is entitled to an undivided half of the land. Chicago, etc., Ry. Co. v. Sioux City, etc., R. R. Co. 594.

2. The term timber includes all trees and woods. Under grant to C. P. R. R. Co. a subsequent purchaser of such lands took no title to the timber. Carr v. Central Pacific R. R. Co. 385.

3. Where the same person owns land, in part by original title and in part by purchase under an execution, and sues for the removal of timber, he is not bound to show from which portion the timber was taken. Marquette, etc., R. R. Co. v. Atkinson, 386.

4. The title of lands in unsurveyed land grants is in the United States. U. S. v. Chicago, 615.

5. Lands granted to Iowa for railroad purposes are not forfeited by a change in a part of the line. Grinnell v. R. R. Co. 618.

LEASE.

1. The assent of stockholders to a lease must be given at a stockholders' meeting. Peters *v.* Lincoln, etc., R. R. Co. 597.

2. A license by a lessee held not to be a sublease. State *v.* St. Paul, etc., R. R. Co. 599.

See CORPORATION, 8.

LIEN OF CARRIER FOR FREIGHT.

Where goods are sent by some route other than the one directed, and without the knowledge or consent of the owner, the railroad has no lien for freight charges, 359.

See CARRIER, 27.

LIMITATION OF LIABILITY.

See CARRIER, 22-26, 53, 75.

LIMITED TICKET, 334.

See CARRIER, 17, 18.

LIVE STOCK.

See ANIMALS.

LOSS OF BAGGAGE, 590.

See CARRIER, 78

MAILS, TRANSPORTATION OF, 592.

See CARRIER, 84.

MASTER AND SERVANT.

1. To entitle an employé of a railroad company to recover for personal injuries through the negligence of a co-employé, it must be shown that his employment was connected with the operation of the railway. Smith *v.* Burlington, etc., R. R. Co. 149.

2. Where nothing more is shown than that plaintiff was a section hand, and, when injured, was engaged in loading a car, this service did not pertain to the operation of the railway. Id.

3. The fact that a train was run at an unlawful rate of speed within a city is no ground for imputing negligence to the railway company, as between it and its employé, where there is no evidence that the injury to the latter was caused by collision with any object. Lockwood *v.* Chicago, etc., R. R. Co. 151.

4. If the mere fact that the car upon which the injured employé was engaged at the time of the injury was then off the track creates a presumption of negligence on the part of the company or some of its employés, it seems that such presumption is rebutted where it has been shown positively that the track was in good order, the engine car, etc., in good repair, and the train properly manned, and not run at a dangerous speed; and it is then incumbent on the plaintiff to make further proof of negligence on the part of the company. Id.

5. Where a brakeman was injured by being thrown from a moving train while uncoupling the engine and tender, and it appears that he was not required to attempt such uncoupling while the train was in motion, but that the rules of the company forbade such attempt, this is such evidence of contributory negligence on his part as justified a compulsory nonsuit in an action for the injury. Id.

6. In an action for negligently causing the death of plaintiff's intestate, a switch tender employed by a railway company, through the explosion of nitroglycerine being transported by it on its road, it was *held* that the defendant, in complying with a proper request from another railroad company to run for it a short distance one of its cars, to be loaded with an article, safe when properly handled, but dangerous when carelessly handled, is not bound to assume negligence on the part of those handling it would occur, nor bound to take measures for the protection of its servants on that assumption. Foley *v.* Chicago, etc., R. R. Co. 161.

MASTER AND SERVANT—*Continued.*

7. When the order for switching the car was given, decedent was notified that the car must be kept out of the way of the passenger train, which would be due after a time, and that if not loaded in due season it must be side-tracked. Such order was an order of caution and not of negligence. Id.

8. Where the decedent went between the cars for the purpose of uncoupling them, but finding them moving at too great speed came out and signalled to check their speed, his afterwards going between the cars to uncouple them is not necessarily contributory negligence. Beems v. Chicago, etc., R. R. Co. 222.

9. The defendant is liable, notwithstanding the negligence of the deceased, if ordinary care was not exercised to prevent the accident after the negligence of deceased was known to defendant's employés. Id.

10. That the decedent's foot had been caught between the rails and he was fastened to the spot is no defence. Id.

11. In an action for damages for the death of a person caused by the negligent acts of railroad employés in backing a train, evidence of the rules of caution in handling "backing" cars, promulgated by the company for the guidance of its employés, is competent as tending to prove negligence. Id.

12. One Haas, a yard switchman in the employ of the defendant, was, while attempting to make a coupling of two freight cars, so injured that death ensued. His administrator brought suit under the statute to recover damages. It appeared that the deceased was a single man, leaving neither widow nor child surviving him; that his nearest relative was a mother possessed of some means; and from the history of the young man, that his past life had not been and his future life probably would not be of any great pecuniary value to his mother. The jury awarded the full statutory limit, $10,000. The district court set aside the verdict as excessive. *Held*, that such ruling must be sustained; that while no arbitary rule of computing the value of the life of a deceased can be laid down, and much must be left to the discretion of the jury, yet it was not the intention of the statute to merely mulct a defendant in damages for negligence, nor to make death a pecuniary speculation to the next of kin, but the intention was to make good to the next of kin the actual loss sustained by such death; and in determining such loss many things should be considered by a jury, among them, whether the next of kin was legally or in fact dependent upon deceased for support, whether the relative pecuniary situation of the deceased and the next of kin was such as to show that probably the next of kin would receive any portion of the deceased's earnings, and also whether the past history of the deceased tends to show that the next of kin would be likely to receive any benefit from the continuance of his life. Atchison, etc., R. R. Co., v. Brown, 228.

13. In a suit against a railroad company to recover for the killing of a person through negligence, while engaged in his duty as a switchman, the nature of his employment at the time of the injury is material on the question whether he was exercising due care. Penna. Coal Co. v. Conlan, 243.

14. Where a copy of the rules of a railway company, showing what was required of switchmen and other servants, was admitted in evidence, and where what work the deceased switchman was required to do, as well as the means at his hand with which it could be accomplished, was distinctly shown, and where the main and side-tracks, and their distance from each other, and the street crossings and yards, with all the other facts deemed necessary, were given in evidence, it was *held* no error to refuse the testimony of other switchmen to show that in their opinion it was not necessary for the deceased to have been where he was when he received the injury, or to have passed along the track, and that there was space enough to properly perform his duties without going upon such track, etc., as the jury were as competent, from the facts shown, as the witnesses, to form an opinion on the questions proposed. Id.

15. In an action against a railroad company to recover for an injury by striking the deceased with a moving train of cars, the declaration alleged that the deceased, at the time, was engaged in his duty in passing over and upon a certain track, "to give directions to others of his co-servants, and to aid in the switching, movement and operation of certain cars being switched upon" such track. There was evidence tending to prove this allegation. *Held*, that proof

MASTER AND SERVANT—*Continued.*

that deceased had another duty to perform, as taking the numbers of the cars, in a memorandum book, constituted no variance, as what the deceased was doing at the time was no part of the tort complained of, or of the means adopted in effecting it. Id.

16. In such case the gist of the action is the defendant's negligence, as alleged, and the motives of the deceased in being upon the track, or why he was there, are wholly immaterial, it being sufficient that he was lawfully there. Any allegation showing why the deceased, as switchman, was upon the track, except that he was rightfully there, is surplusage. Id.

17. H., who was in the employ of a railway company as a "capstan-man," without giving the usual warning, propelled a series of trucks along a line of rails in a goods station, and injured the plaintiff, who was engaged in similar work at the other end of the line about 100 yards off. The capstan was set in motion by hydraulic power communicated to it by H. from a stationary engine at a distance. *Held*, that there was evidence to warrant the jury in finding that H. was a person who had the charge or control of "a train upon a railway" under s. 1, sub-s. 5, of the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42). Cox *v.* Great Western Ry. Co. 485.

18. An employer who introduces, without notice to his employé, new and unusual machinery, whether belonging to himself or another, involving an unexpected or unanticipated danger, through the introduction of which the employé, while using the care and diligence incident to his employment, meets with an accident, is liable in damages. O'Neil *v.* St. Louis, etc., R. R. Co. 614.

19. If a master or another servant, standing towards the servant injured in the relation of superior, orders the latter into a situation of danger, and he obeys and is thereby injured, the law will not charge him with contributory negligence, unless the danger was so glaring that no prudent man would have entered into it. Miller *v.* Union Pacific R. R. Co. 614.

20. Injury to employé by defective car. Palmer *v.* Denver, etc., R. R. Co. 615.

21. Who are fellow-servants? Duty of master as to machinery in workshop. Totten *v.* Penna. R. R. Co. 616.

22. Rules governing in suits by employés stated. Granville *v.* Minneapolis, etc., R. R. Co. 612, 618.

See NEGLIGENCE, PLEADING AND PRACTICE, 37–44.

MECHANICS' LIEN.

1. A statutory right of action against a corporation for labor done and materials furnished follows the assignment of the claim; otherwise it would be determined by the claimant's death, and perhaps by his insolvency. Contractors and sub-contractors are not "laborers" within the meaning of the statute giving a right of action for labor debts. Under an act giving a right of action for labor debts, a laborer may sue for work done by his team, where no right arises from its service to any other person. Chicago, etc., R. R. Co. *v.* Sturgis, 619.

2. Mechanics' liens as against railroads considered. St. Louis, etc., R. R. Co. *v.* Memphis, etc., R. R. Co. 600.

MERCHANDISE AS BAGGAGE, 811.

See CARRIER, 10.

MINES AND MINERALS, 555.

See EMINENT DOMAIN, 10.

MINOR.

See CHILDREN.

MOB, DELAY OF FREIGHT BY, 891.

See CARRIER, 43, 44.

MORTGAGE.

In a suit on bonds secured in part by a second mortgage, the trustees of the second mortgage are necessary parties. Where a State statute provides for the functions of trustees, mortgages executed under the laws of the State need not expressly provide therefore. Mercantile T. Co. *v.* Portland, etc., R. R. Co. 614.

NEGLIGENCE.

1. Where a railway company has constructed a trestle-work or bridge over a street and creek, at a place where the street has not been graded or improved, and there are no railings to the trestle-work or bridge, and no foot planks upon it, and the only way of crossing is by stepping from tie to tie, and the railway company is constantly using the track, and a party climbs up and attempts to cross without the consent of the company, and is injured by being run over with a hand-car; *held*, the court commits no error in ruling out the evidence concerning the custom of foot passengers crossing such trestle-work or bridge, after two persons had testified to it without objection. Mason *v.* Missouri Pacific R. R. Co. 1.

2. A railway company has exclusive right to occupy, use and enjoy its railway tracks, trestle-work and bridges, and any person walking upon a track or bridge, without the consent of the company, is a trespasser; and in case of an injury happening to such person while so trespassing upon it, from the movement or operation of the cars of the company over it, he is without remedy unless it be proved by affirmative evidence that the injuries resulted from negligence so gross as to amount to wantonness. Id.

3. The deceased was a full-grown man, but was deaf and dumb, and that at the time of the accident he was walking on the track of the company in the same direction as the train that killed him. The evidence was conflicting as to whether any whistle or bell was sounded by the train, so as to warn the deceased of his danger, and if so, when it was sounded. The court instructed the jury that if those in charge of the train saw the plaintiff's intestate in time by the use of the means in their power to have saved his life by checking the train or by blowing the whistle and ringing the bell, and the defendant's employés wilfully failed to use such means to avoid the killing, they must find for the plaintiff. *Held*, that this instruction was erroneous. The jury should have been told that the defendant's employés, being ignorant of the physical infirmity of deceased, had a right to believe that he would do what a man possessed of his ordinary faculties would have done, viz., stepped off the track in time to avoid danger, when he heard the approaching train, and that hence they were not in fault for failing to stop the train. Louisville, etc., R. R. Co. *v.* Cooper, 5.

4. Semble, that if knowledge of the physical infirmities of the deceased had been brought home to said employés they would have been held to a stricter measure of duty, and that a failure on their part to discharge that duty would have constituted either absolute intentional killing or wilful neglect, for which the company would have been held liable. Id.

5. A railroad company is entitled to the possession of its roadway. The travelling public has no right to the use of it, except at crossings and other places of public passage. But if persons travelling on a railroad track are seen in time to avoid danger, by warning them off by proper signals, it is the duty of the officers of the train to resort to such means to prevent injury even of trespassers on the road. Teunenbroock *v.* Southern Pacific R. R. Co. 8.

6. No duty is imposed to sound a whistle in the lawful use of the roadway, except in approaching crossings on a road, or other places of public passage, or in coming to stations, or into towns or cities. Accordingly, *held*, defendant was not responsible for injuries occasioned while it, without fault, was running its train at the customary speed and without sounding a whistle, at a portion of the road not approaching a crossing or place of public passage, but upon a trestle bridge crossing a ravine about a mile from a station. *Held*, further, plaintiff was guilty of contributory negligence. Id.

7. If one who enters upon the track of a railway when no train is in sight should, from providential cause, become insensible while there, and in that con-

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dition be run over and injured by a train while lying in open view, the company would be liable in damages on account of that negligence on the part of its agents in not discovering the helpless man, which was the proximate cause of the injury. H. and T. C. R. R. Co. *v.* Symkins, 11.

8. The doctrine that a railway company owes no duty to one unlawfully on its track, and is not liable in damages for injury to such an one unless wantonly inflicted, discussed and disapproved.

9. A reasonable look-out, varying according to the danger and all the surrounding circumstances, is a duty always devolving on those in charge of a railway train in motion. Id.

10. Railway companies are bound to exercise their dangerous business with due care to avoid injury to others, and when they fail to do so, they are liable in damages for injury resulting even to a trespasser who has not been guilty of contributory negligence. Id.

11. One who, while helpless from drunkenness, is run over and injured by a passing railway train, is guilty of contributory negligence, which constitutes a bar to his action for damages, unless his injuries were wantonly or wilfully inflicted. Id.

12. If the proximate cause of injury to one run over and maimed by a railway train is the negligence of the engineer in charge, and the party injured is prevented by a providential dispensation from the use of his faculties at the time of the injury, the fact that prior to the time of the injury, when no train was in view, and before being providentially disabled, the injured party placed himself wrongfully on the track of the road, would not constitute such contributory negligence as would prevent a recovery. Id.

13. The defendant requested the court to charge that the plaintiff, being about to drive a team, with two mules and a horse on the lead, across a railroad track, with a loaded wagon, where trains were running propelled by steam, having placed his son, seven years of age, on the lead horse, over which he (the father) had no control, was guilty of negligence in placing his son in such a dangerous position, and cannot recover for the loss of the life of his son or his horse killed by the passing train; which the court answered: "This point assumes a fact, the existence or non-existence of which is a question for your determination, to wit: That the plaintiff placed his son on a horse over which he had no control. This is for you, and we cannot assume it. If it were true it would be strong evidence of negligence. It is for you to find, under all the evidence in the case, whether there was negligence either on the part of the plaintiff or of his son, who was killed, which contributed to the production of the accident. If there was such contributing negligence, the plaintiff cannot recover." *Held*, that the assumption in the point forbade its affirmance, and that it could have been well refused without any qualifying remarks. *Held*, further, that there was error in the remark that if the assumed facts were true it would be strong evidence of negligence, for on the verity of the facts as assumed, without reference to other proofs, the plaintiff was guilty of negligence, and as it was not certain that this error did the defendant no harm, the judgment must be reversed. Pennsylvania R. R. Co. *v.* Bock, 20.

14. Defendant moved in arrest of judgment on the ground that there had been a misjoinder of rights of parties. The declaration discovered no inconsistency in the rights sued upon, nor any misjoinder of the claimants thereunder. *Held*, that there was nothing on the face of the record to arrest the judgment, and if there was actual misjoinder, it should have been taken advantage of on the trial. Id.

15. A common-law and statutory claim for damages may be joined in the same action when they admit of the same pleas and are followed by the same judgment. Id.

16. A father brought an action against a railway company for the death of his minor son by the alleged negligence of the company. In the same suit he also joined a claim for damages for a horse killed at the same time. At the trial it was agreed that the case should be tried as if the mother of the boy were a party, and that she should be concluded by the verdict. The verdict was for

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the plaintiff. A motion was made in arrest of judgment. *Held*, that there was nothing on the record which could be taken advantage of by this motion. Id.

17. The plaintiff, a deaf man, being about to cross a railroad track, in a buggy, saw the smoke of what he took to be a moving train east of him. He crossed, drove eastward a distance of 250 feet along a road which ran parallel with the railroad and within a few feet of it, turned and drove back the same way he had come, attempting to recross the track at the same place. He never looked to the east to ascertain the direction in which the train was moving, but assumed that it was moving away from him. The view to the east was unobstructed for more than half a mile. When in the act of recrossing the track, he was looking back over his shoulder to the southward. In this position he was struck and injured by the train coming from the east. *Held*, that the accident was the result of his own negligence, and the railroad company was, therefore, not liable. *Held*, also, that his deafness was no excuse. It should rather have added a spur to his vigilance, and prompted him to employ his other faculties so as to compensate, as far as possible, for the lacking one. *Held*, also, that although plaintiff was in full view of those operating the train for a long distance, yet they were not chargeable with negligence owing to the fact that the road forked just at the crossing, and they could not anticipate that plaintiff intended to take that branch which crossed the track. *Held*, also, that under the circumstances it was immaterial whether the proper signals for the crossing were given or not. Purl *v.* St. Louis, etc., R. R. Co. 27.

18. Under peculiar circumstances going to excuse the plaintiff from taking the usually necessary precautions to avoid danger, an instruction in a suit to recover for a personal injury from a passing train at the intersection of the track with a street crossing, that if the plaintiff knew of the existence of the track at the place of the injury, and that trains frequently passed along the same, and could have looked for and seen, or have listened and heard, the approaching train before going upon the track, and did not thus look and listen for the train, and that by reason of such neglect he failed to avoid the injury, may be properly refused, although ordinarily such an instruction should be given. Pennsylvania Co. *v.* Rudel, 30.

19. Plaintiff's intestate was riding with one B., when upon approaching defendant's track the horse became unmanageable and dashed upon the track in front of an approaching train, and both B. and intestate were killed. The track near the crossing runs through a deep cut and the evidence was conflicting as to whether the bell was rung or whistle blown. It appeared that intestate jumped from the wagon just as he was struck by the locomotive. *Held*, that it was for the jury to determine from the evidence whether defendant was negligent in remaining in the wagon, and it was therefore error to non-suit, that if defendant heard the noise of the locomotive or was in any way apprised of its approach in time to have enabled him to avoid the danger by the exercise of reasonable prudence, and he chose to trust in the ability of the driver to manage the horse and avoid collision, defendant is not liable, notwithstanding the omission to ring the bell or blow the whistle; but if deceased did not hear the train or know of its approach, the mere fact that the horse on seeing the engine started forward, and getting beyond control drew the wagon on the track, would not exempt defendant from liability. Cosgrove *v.* N. Y., etc., R. R. Co. 35.

20. Upon the trial of an action against a railroad company for negligent collision with and injury to plaintiff's wagon and horses at the crossing of a public highway, it appeared by the testimony of plaintiff's witnesses that plaintiff drove his team at a brisk trot upon the crossing without having stopped to listen for trains; that he had looked, but at a place where a thicket well known to him prevented a view of the track; that if he had looked at any other point he would have seen the locomotive which did the injury. *Held*, that he was guilty of contributory negligence, which debarred him of recovery. He directly contributes to his own injury, who, paying no attention to his own safety, trusts to the obligations imposed upon the company to warn him of an approaching train. Turner *v.* The Hannibal and St. Joseph R. R. Co., Appellant. 74 Missouri Reports, 602.

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21. The liability of horses to take fright at unusual noises or objects is a thing to be apprehended and guarded against; and the wrong-doer who does an act likely to cause horses to take fright, must be deemed to be responsible for injuries caused by horses running away under the influence of the fright. Billman *v.* Indianapolis, etc., R. R. Co. 41.

22. Negligently and wantonly sounding a steam whistle, so that horses lawfully near are caused to run off and inflict an injury, renders a railroad company liable to the one injured by the intervening agency. Facts showing a necessity, or a reasonable excuse, for the use of the whistle, render a different rule applicable. Id.

23. The horse which plaintiff was driving caught his foot in the space between the rail and the plank on the crossing and fell down on the track. Plaintiff alighted and endeavored for about two minutes to extricate the foot, when a train came along and broke the horse's leg. In a suit for damages the court non-suited the plaintiff, invoking the rule that he should have "stopped, looked and listened" before approaching the crossing. *Held*, that the rule was not applicable to the case, that the true question was whether the company was guilty of negligence in allowing the track at the crossing to be in an insecure condition, and that this question should have been submitted to the jury. Baughman *v.* Shenango, etc., R. R. Co. 51.

24. While plaintiff was driving his mare across the track of defendant's road at the intersection of two streets her foot caught between the planking and one of the rails and she was injured. Upon the trial of an action to recover damages, plaintiff's evidence was to the effect that there was over three and one fourth inches between the plank and the rail, while two and one quarter inches was all that was required for the passage of the flanges of the car wheels, and because of this the horse's hoof got into the open space and the toe calk caught under the rail; that the plank was from one fourth to three eighths of an inch higher than the top of the rail; and that the crossing was constructed differently from others upon defendant's road and upon other railroads. Plaintiff was nonsuited on the ground that there was no evidence of negligence on the part of defendant. *Held*, error; that the question of negligence was one of fact for the injury. Payne *v.* Troy, etc., R. R. Co. 54.

25. Decedent was seen about to cross a railway track in a village, at a time when a train was approaching from one direction, and one backing towards her from the other direction. She was soon after found dead outside the street limits on railroad grounds, having been run over by the backing train. *Held*, that her being found where she was, outside the street limits, did not of itself make out against her a case of contributory negligence. Michigan, etc., R. R. Co. *v.* Hassenmeyer, 60.

26. From the evidence at the trial, it appeared that there was no one who saw the infliction of the injuries from which the deceased died, but as far as could be ascertained, there seemed to be no rational explanation of her injuries, other than contact with some portion of a passing train of the defendant, and it was not controverted by the defendant that the injuries were so caused. The only evidence on the subject of a "look-out" was that of the engineer and fireman of the train, which was uncontradicted and unimpeached. They proved that they were both engaged at the time in keeping a most careful and vigilant look-out, and neither of them saw the deceased on or near the railway. *Held*, 1. That it could not be inferred from this fact that their testimony was not true, and might be disregarded by the jury, unless it had been shown, which was not done, that the deceased was on the track in front of the train, and was struck by the locomotive. 2. That if she came in contact with some other part of the train, either in attempting to cross, or getting too near the track after the locomotive had passed, she would not be seen by the engineer or fireman; and their failure to see her under such circumstances, would be no ground for imputing negligence to them, as they were under no obligations to look back. Northern, etc., R. R. Co. *v.* Burns, 66.

27. The proof was that the crossing was not dangerous, and it was not usual to give signals by ringing the bell or sounding the whistle at that place. There

[illegible]—*Continued.*

did not appear to be any reason why such signals should be given, unless some one should be seen on or approaching the track. The train was in sight for the distance of two hundred yards, and the deceased could have seen it, if she had looked, time enough to have crossed in safety, or to have waited till it had passed. *Held*, 1. That it was impossible under the circumstances of the case to ascribe the accident exclusively to the failure to give signals of the approach of the train. 2. That before going upon the track or attempting to cross it, it was the duty of the deceased to look for an approaching train, and her failure to do so was negligence on her part. 3. That at the time and place when the accident occurred, there was no obligation on the part of the defendant to give signals of the approach of the train by sounding the whistle or ringing the bell, and negligence could not be imputed to it if they were not given. 4. That it was error to submit the case to the jury, there being no evidence of negligence on the part of the defendant. Id.

28. Railroad companies are not bound to station flagmen at the crossing of public highways, no matter how dangerous. If the bell is rung, or the whistle sounded, as the train approaches the crossing, in compliance with section 806, Revised Statutes, a company fulfils its whole duty, except, perhaps, in a case where the crossing is of such a character that the employment of a flagman is one of the common and usual means of warning adopted by prudent railroad companies. In such case the omission to employ one might be negligence. Wabash, etc., R. R. Co. v. Hamilton, etc., R. R. Co. 75.

29. The complaint alleged the negligent construction, by the defendant, of a number of parallel railroad tracks across a public street at a point where the plaintiff was attempting to cross when injured; also the negligent condition of the sidewalk crossing such tracks; also the failure of the defendant to keep a watchman at such crossing, as required by an ordinance of the common council of the city within which were such street and crossing; also the failure of such employés to sound the whistle and ring the bell of the engine when approaching the crossing. The failure to sound the whistle having been proved by the plaintiff, the defendant offered in evidence another ordinance of such council, prohibiting the sounding of whistles and ringing of bells on engines while passing through the city. *Held*, that the exclusion of such evidence was erroneous. Pittsburgh, etc., Co. v. Hensil, 79.

30. The rate of speed of such train, in connection with other circumstances, may be considered in determining the question of negligence; but the rate of speed at which a train can be run with safety to the passengers cannot, in itself, be deemed negligence as against one who is injured thereby at a crossing. Terre Haute, etc., R. R. Co. v. Clark, 84.

31. Where, in such action, it is shown that the deceased, possessed of all his faculties, and knowing the existence and location of the railroad, and presumably familiar with the time of the trains running thereon, approached the railroad crossing in a covered wagon, with no opening except in front, without stopping still at any point to look or listen for an approaching train, and, for a distance of more than forty yards from such crossing, drove his team in a trot, without stopping or looking, until he reached the crossing where he was run over and killed, such conduct is contributory negligence on the part of the deceased, and is sufficient to bar an action by his administrator to recover damages for his death. Id.

32. An old man, who was somewhat deaf, while driving a span of colts towards a railway track down a narrow road from which the track was concealed on one side by a high embankment, stopped to listen, but hearing nothing drove on, and when close by the track a train appeared within a few rods. Fearing that he could not control his horses where they were, he whipped them up and tried to cross the track, and the rear of the buggy was struck by the locomotive. *Held*, that in an action for the resulting injury the question whether plaintiff was guilty of contributory negligence was for the jury. Chicago, etc., R. R. Co. v. Miller, 89.

33. Plaintiff, while crossing the railway of defendant upon a public street, driving a span of horses with a wagon, was struck by a train of cars propelled

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by an engine. Evidence that the train was propelled at an unlawful rate of speed; that no bell was rung, or signal given, as required by law; that it was an unusually dangerous crossing, and that no flagman was stationed there to warn travellers; and that a view of the passing train was obstructed from one approaching on the street by a train of cars left standing upon a side track, extending across the street, with an opening in the train for passage upon the street. *Held*, sufficient evidence to charge defendant with negligence. Kelly *v.* St. Paul, etc., R. R. Co. 93.

It appearing that plaintiff, before going through the opening in the train and upon the track where the accident occurred, brought his horses to a walk, but did not stop them, nor leave his wagon and go forward where he could see an approaching train; that he looked and listened for a train, but could not see or hear any signal of its approach. *Held*, that the evidence does not show, as a matter of law, contributory negligence on the part of the plaintiff. Id.

34. Where the plaintiff testified that as he approached, with his wagon and team, a railroad crossing of a public street, adjoining the passenger depot of the railway company, he looked to the west (the direction from which the train came), and all he saw was a large pile of lumber, and didn't hear any bell or whistle; and a witness stated that he was ten or fifteen feet from the depot, but heard no signals until the collision, and would have heard them if any had been given; and four other witnesses, who were present, testified that they did not hear the whistle sounded or the bell rung until the instant of the collision; and a passenger on the train and in a car next to the rear one stated that he didn't hear any alarm; and on the part of the defence, the fireman and engineer testified that they whistled for station above the tank 300 or 400 yards west of the crossing, and rang the bell continuously from the tank until the train stopped; and five other witnesses stated that they heard the whistle sounded 300 or 400 yards west of the crossing, and the ringing of the bell as the train came in, *held*, that there was a sufficient conflict of evidence to raise a question of fact whether proper and timely signals were given, and the trial court was justified in submitting the evidence to the jury for their consideration. *Held, further*, that there was evidence sufficient to sustain the finding of the jury that proper signals of the approach of the train to the crossing were not given. Kansas Pacific R. R. Co. *v.* Richardson, 96.

35. Where a person as he approached a railroad crossing at the main thoroughfare of a city with his team and wagon, looked west (the direction from which the train afterwards came), saw only a pile of lumber, and heard no bell or whistle, then looked ahead, saw the street clear and attempted to drive across, then tried to pull his team around to avoid the coming train, but too late to prevent a collision, and evidence is produced tending to prove that the train was coming in at too great a rate of speed, and that no timely signals of warning of the coming of the train were given, but some witnesses testified that they hallooed to him to stop as the train was coming, and one witness stated that he took off his hat at him and told him the train was coming, and such person testified, "He didn't hear anybody call," *held*, that it will be left to the jury to say whether such person was guilty of contributory negligence. In such a case, and under such circumstances, the question of negligence or want of proper care is a matter of ordinary observation and experience of the conduct of men, and the judgment of a jury ought to control. Id.

36. It was averred in the petition that the injuries were caused by the neglect of the company in crossing the public street of the city with a locomotive and train of cars at a very swift, rapid, dangerous, and reckless rate of speed, and without giving any warning of the approach of the locomotive and cars by sounding a whistle or ringing a bell, and that the view of the approach of the locomotive and cars was obstructed by cars standing on the track and by lumber piled in close proximity to the road: *Held*, not error, under the allegations, for the trial court to permit the plaintiff to prove that the company had no flagman at the crossing of the street, as one of the circumstances existing at the time and place of the accident. Id.

37. The plaintiff testified that before attempting to cross defendant's track he

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had stopped, looked, and listened. The defendant adduced evidence to the contrary. The court instructed the jury that the plaintiff could not recover unless he established that he was using due care; that he did no act that contributed to the injury, nor omitted to take any precaution that would have prevented it. *Held*, that the instruction was proper. Shaw v. Jewett, 111.

38. In the above case the negligence charged upon the company defendant was failure to ring the bell of the engine. The evidence was contradictory whether the bell was rung or not. *Held*, that the question was for the jury. Id.

39. In the above case the court instructed the jury that the plaintiff had a right to assume that the defendant would do its duty and ring a bell, adding further that the plaintiff, though he might make that assumption, was not relieved thereby from the duty on his part to vigilantly use his senses to avoid danger. *Held*, that the instruction as qualified was proper. Id.

40. In the above case the defendant asked the court to instruct the jury that if they believed the plaintiff could have seen the train at distance enough from the track to have stopped his horse before reaching the track, his failure to see the train was negligence on his part, and he was not entitled to recover. The court refused the point, instructing the jury that the question was not alone whether the plaintiff could have seen the coming train at the indicated distance from the track, but whether when at that distance he looked and listened for it, and whether it was so plain that at that distance he could and would have seen it if he looked, and that his not seeing it was proof that he did not look. *Held*, that the instruction was proper. Id.

41. In the above case the court told the jury that he would leave it to them whether or not the instinct of self-preservation would prevent a man from attempting to cross a railroad if he saw that the engine was bound to reach the point of crossing before he could cross, adding that it was for the jury to find whether plaintiff took the precautions of a prudent man before attempting to cross the track, and that the law exacted of him in such case a vigilant use of his senses to look both ways and to listen. *Held*, that the instruction was proper. Id.

42. In an action against a railroad company for running over and killing a person who was driving across the track of the company, the court instructed the jury as follows: If you find that defendant's train caused A. B's death, that it was on the day of the accident behind time and running rapidly to make up the same, that the track on which said train was running was obscured from sight of the highway along which A. B. was driving by a cut and other obstructions; if you find that the team in which A. B. was driving stopped before reaching the track, and that the driver looked and listened and could not see nor hear the approaching train, and then drove on not hearing nor seeing said train till it was too late to avoid the accident; if you further find that said train was running on a down grade, that the employés of the defendant failed to give any warning until too late to avoid the collision, and that A. B's death resulted from such collision, you must find for the plaintiff. *Held*, that there being other facts in the case the instruction was imperfect and indefinite, and consequently erroneous. *Held*, further, assuming that all the facts in the case were set forth in the instruction, that it was erroneous because the question of both the defendant's negligence and the plaintiff's contributory negligence should have been left to the jury. Pittsburg, etc., R. R. Co. v. Wright, 114.

43. Where a person crosses a railroad track by a common and well-known footpath, used by the public for many years without let or hindrance on the part of the employés of the railroad company, he cannot be regarded as a trespasser. Phila., etc., R. R. Co. v. Troutman, 117.

44. A weak-minded girl of between twelve and thirteen years of age started upon a footpath such as has been above described, which lay within the limits of a village of about fifty houses. Upon approaching the tracks, which were three in number, she stepped upon the first track on observing the approach of an engine on the third track. The engine stopped directly abreast of her, and seeing no approaching train, she started to walk down the track on which she

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had been standing, and so around the engine. While engaged in so doing she was struck and injured by a train of stone cars which had been detached from the engine above spoken of about three quarters of a mile above, and which having attained a rate of speed of fifteen or eighteen miles an hour, had been by a flying switch turned from the third track upon the track on which the girl was walking only about one hundred and fifty feet from the point where she was struck. There was no whistle blown or alarm of any kind given to the girl. The engineer of the standing engine, the only one of the employés of the railroad company who saw her, did not attempt to save her, because, as he testified, he did not observe that she was upon the track. Suit having been brought by the girl against the railroad company to recover damages for the injury done her; *held*, that the evidence disclosed negligence on the part of the company's employés. *Held*, further, that it disclosed no contributory negligence on the part of the plaintiff, or at least certainly no such contributory negligence as would require the court peremptorily to instruct the jury that the plaintiff was not entitled to recover. Id.

45. The complaint averred in substance that, upon the arrival of the train upon which plaintiff was a passenger at the station which was his destination, said train slackened in speed so that plaintiff could have alighted safely had there been a platform or other suitable place prepared for passengers to step on; that the hight was dark, the wind blowing, and the rain falling; that the plaintiff, in obedience to the order of the conductor, stepped off the train expecting to alight upon a platform, but that, through the fault of the company, there was no platform, but an uneven piece of ground sloping from the track to a ditch, wholly unsuitable for the accommodation of passengers, down which plaintiff fell, injuring himself severely, the wheels of the car passing over his leg; wherefore plaintiff sought to recover damages. *Held*, that the facts averred did not clearly show that the plaintiff was free from contributory negligence, and that, therefore, in the absence of an express averment to that effect, the complaint was insufficient and demurrable. Cincinnati, etc., R. R. Co. *v.* Peters, 126.

46. A passenger train running at night at a high rate of speed upon a railroad track was thrown therefrom by a misplaced switch. The track-walker employed by the company had visited said switch only an hour before the accident, and found it in proper condition and safely locked. Shortly after that inspection a train had passed thereover in safety. There was no light on the switch, that not being the custom of the company; hence the engineer of the wrecked train was unable to see that the same was misplaced until within about ten rods thereof, when he observed that the red side of the signal target was partially turned towards him. He hesitated for a moment, but before he was able to determine what he should do, the train was thrown from the track. The engine and train were not provided with the Westinghouse air-brake, but even if they had been, the engineer thought he could not have brought the train to a halt so as to avert the accident. In an action brought against the company by a passenger on the train who was injured, to recover damages, the court charged that if the defendant had done all that human prudence and forethought could do to prevent the accident, the plaintiff could not recover, but that it was for the jury to say whether it had exercised such prudence and forethought, and whether it was not its duty to guard and light the switch, and to supply a proper air-brake, and also that the jury had no right to find that the misplacing of the switch was the work of a stranger without evidence to that effect. The jury having found for the plaintiff: *held*, that the instructions of the court were not erroneous. New York, etc., R. R. Co. *v.* Dougherty, 189.

47. Under section 1808, Wisconsin Rev. St., it is the duty of a railway train approaching a railway crossing to come to a stop, not immediately at the 400-foot post, but somewhere between that post and the crossing. Lockwood *v.* Chicago, etc., R. R. Co. 151.

48. There was no error in refusing to submit to the jury the question whether the defendant railway company was negligent in running its train at the rate of eight or ten miles an hour on a certain curve, when all the evidence in the case, as well as common experience, shows that trains are daily run with safety

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at a much greater speed over similar curves, and where it appears conclusively that the track was in good condition. Id.

49. The fact that one in attempting to cross a railroad does not, at the instant of stopping on it, look to ascertain if a train is approaching, is not conclusive evidence of a due want of care on his part. Plumer *v.* Eastern R. R. Co. 165.

50. His omission to do so is to be submitted to a jury for their consideration. Id.

51. The evidence showed that the plaintiff, while riding in a car of the defendant, got up and gave his seat to an elderly lady. The car being crowded he was obliged to pass out on to the front platform. While standing there the car ran off the track, and at the request of the driver the plaintiff, with others on the platform, got off and assisted in getting the car again on the track. When this was done the passengers got on the front platform again by stepping over an enclosure three feet high surrounding the same; and while the plaintiff was in the act of getting on the platform in the same manner, the driver, without a signal or warning, started the horses. By the sudden jerk in starting, the plaintiff was thrown down on the side of the car and was dragged some distance, and his foot crushed by the wheel. The accident occurred in the daytime, and there was proof tending to show that the driver might have seen the plaintiff in the act of boarding the car. Proof was also offered to show there was a notice on the inside of the car requiring passengers to enter and leave the car by the rear platform. *Held*, 1. That considering there was negligence on the part of the plaintiff in attempting to enter the car by the front platform, the question was whether the driver of the defendant's car, by the exercise of proper care and prudence, might have seen the position of the plaintiff, and thereby have avoided the injury. 2. That under the circumstances of the case, taking into consideration that the plaintiff had paid his fare, and that owing to the crowded condition of the car he was obliged to stand on the front platform, that he had gotten off at the request of the driver to help in getting the car again on the track, and the other facts in the case, there was an obligation on the part of the driver to see that the plaintiff and others had an opportunity to get on the car again before he started the horses; and if he saw, or by the exercise of proper care might have seen, the position of the plaintiff and thereby have avoided the injury, the defendant was liable. 3. That there was evidence legally sufficient to submit this question to the jury. People's, etc., R. R. Co. *v.* Green, 168.

52. The defendant is the owner of a street railroad. The cars are propelled by means of an endless cable, and to each car is attached a dummy, carrying the gripping apparatus. Seats are arranged on the sides and at the end of the dummy for the use of passengers. The railroad has two tracks, the northern track being for cars going up-hill, and the southern track being for descending cars. Plaintiff's husband seated himself as a passenger at the lower end of the seat, on the south side of the dummy. A two-horse express wagon had crossed the northern track and was standing on the southern track, at a point about one hundred and fifty feet distant, at the time the dummy in question started; the wagon was so cramped that the horses were headed toward the north track, their heads projecting so far over it that the approaching dummy would have struck them, and the rear end of the wagon pointed obliquely down the hill, also toward the northern track. As the dummy came up to the wagon two passengers seated on the southerly seat jumped over the back of the seat; as the rear end of the dummy came up a hind wheel of the wagon collided with the dummy, and plaintiff received injuries from which he died. Verdict for plaintiff for $8000. Judgment affirmed. (See Pleading and Practice, 81, 83.) Cook *v.* Clay, etc., R. R. Co. 175.

53. The injury consisted in the throwing of a jet of water from a water tank on the appellee. It being charged in one paragraph of the complaint that it was done wrongfully and purposely by the servants of the appellant in charge of the train, and in a second paragraph that it was done carelessly and negligently. Terre Haute, etc., R. R. Co. *v.* Jackson, 178.

54. The doctrine is now well settled that a corporation is liable for the wilful acts and torts of its agents, committed within the general scope of their em-

ployment as well as acts of negligence; and that the corporation is thus bound, although the particular acts were not previously authorized nor subsequently ratified by the corporation. It is therefore immaterial whether the conductor or brakeman had been required or authorized to wash out cars of the company for any purpose. For the purpose of carrying the passengers safely the appellant was represented by its agent, and if they did anything inconsistent with that safety, appellant is liable. The drenching of a passenger with water, either negligently or wilfully, is a clear and direct breach of the duty to carry safely. Id.

55. Plaintiff, a boy of seven years, had his foot crushed by a turn-table of defendant, upon which he and other boys were playing. The defendant was not using the table at the time, and had no one in charge of it. The plaintiff and the other boys put the table in motion for their own amusement. *Held*, that the rule which applies to adults in reference to contributory negligence cannot be applied to infants of tender years. Evansich *v.* Gulf, etc., R. R. Co. 182.

56. It is not always contributory negligence per se for a traveller to attempt to cross a railway track without waiting until a train, which has just passed, has gone so far as not to obstruct his view of another train approaching on a parallel track in an opposite direction. Philadelphia, etc., R. R. Co. *v.* Carr, 185.

57. A. was walking along the street of a city, which was crossed by the tracks of a railroad. Seeing a train approaching on the track nearest to her she paused to let it pass. As the last car passed her she looked both ways, and also listened, but heard nothing to alarm her, and accordingly when the rear end of the train, which had just gone by, was about a car length off attempted to cross the track. On the way she tripped and fell upon the track immediately beyond that on which the train, which had just passed, had been running, and after lying there prostrate about a quarter of a minute was run over and injured by a train approaching from the opposite direction. The engine of the train by which she was injured passed the rear car of the first train she had observed about three hundred feet from the scene of the accident. A., having brought suit against the railroad company to recover damages for the injury done her, the defendant requested the court to charge that the plaintiff had been guilty of contributory negligence in attempting to cross while the train, which had just passed, prevented her seeing the incoming train by which she was injured. The court declined so to charge, but left the question of the plaintiff's contributory negligence to the jury: *Held*, that under the circumstances, this was not error. Id.

58. The plaintiff was a travelling agent for an insurance company; his sister, who was unwell and was temporarily residing in a distant State, had written to him that she had had a severe attack of illness and desired to be carried to her home; that he had written to her, stating his situation, that he was travelling, and asking her to arrange with a friend to bring her as far as a certain city, and that he would make arrangements for some one to accompany her from that place to her home, if her friend could not come with her any farther; that he expected an answer to his letter would reach B. in a week, which would decide whether he would have to go after her, or whether her friend would take her home; that, after writing this letter, he was absent from B. for about three weeks, travelling on his insurance business, but expected to reach there on the evening of a certain Saturday, for the purpose of getting his mail, procuring funds and attending to his business at the office of the insurance company; and that he missed a connection of trains, and, being desirous to reach B. in order that he might receive the expected reply from his sister, took passage on a freight train of the defendant on the following Sunday morning, and received the injuries complained of. *Held*, that there was no evidence which would justify the jury in finding that the plaintiff was travelling from necessity or charity, within the meaning of the Gen. Sts. c. 84, § 2. Bercher *v.* Fitchburg R. R. Co. 212.

59. Testimony showing how far a train of cars ran after striking a person, is competent evidence in a suit against the railroad company to recover damages for causing the death of the person struck, as tending to show the train was

running at a greater speed than allowed by ordinance of the city in which the accident occurred, and also that the train was not under proper control. Penn. Coal Co. v. Coulan, 242.

60. In an action for injuries resulting from the alleged negligence of a railroad company in neglecting to maintain in a safe condition a highway crossing, in not replacing a plank which had been removed, *held*, that it was proper to allow plaintiff to prove that after the injury defendant repaired the crossing by replacing the plank. Where a road is used openly and notoriously by the public as a highway, and a railroad company recognizes it as such by permitting the public to cross their track, and by assuming to maintain a public crossing at that point, it is immaterial whether the road be a legal highway or not. Under such circumstances, the company are bound to exercise the same precautions to keep the crossing in repair as if the road were in fact a legal highway. The fact that a person attempts to pass over a railroad crossing on a highway after he has noticed that it is unsafe, by reason of being out of repair, does not necessarily constitute negligence, nor is he necessarily bound absolutely to refrain from pursuing his course. This would depend upon the circumstances of the case. If, under the circumstances, he had reasonable cause, in the exercise of ordinary care and discretion, for believing that he could pass over in safety, and exercised due care in attempting to do so, he would not be guilty of negligence. In this case, under the evidence, these were questions of fact for the jury. Kelly v. Southern Minnesota R. R. Co. 264.

61. When the injuries complained of are the result of inevitable accident, no compensation can be allowed. Tucker v. Duncan, 268.

62. It is the duty of one desiring to cross a railroad to use his powers of hearing and of vision to ascertain whether or not there is likely to be an approaching train, and if so, to stop until the danger is past. If there is no obstruction to either the sound or vision, then the passer need not stop, but must use both these faculties; if there is such obstruction, then it is his duty to stop and both look and listen; and if he neglects to use these precautions and a collision takes place, compensation cannot be given, unless it was caused by the gross negligence or wrongful conduct of the employees conducting the railroad operations. Id.

63. Where a party voluntarily goes upon a railroad track where there is an unobstructed view, and fails, without excuse, to look or listen for danger, he is, as a matter of law, guilty of negligence, and not entitled to recover for damages he may sustain by reason thereof from a passing train. But where the view is obstructed, so it is difficult to know of the approach of the train, or there are complicating circumstances calculated to deceive or throw him off his guard, the question is one for the jury. Laverenz v. Chicago, etc., R. R. Co. 274.

64. Question as to whether deceased plaintiff's intestate was guilty of contributory negligence, *held*, to have been properly submitted to the jury. Id.

65. The following instruction sustained: "The jury are instructed that it is as much the duty of a railroad engineer to exercise prudence and caution in running his train, so as to avoid injury to persons crossing a track, as it is the duty of such persons to avoid contact with the train. Therefore, if they believe from the evidence that the engineer who was driving the express train on the morning of June 12, 1877, had an opportunity to see Bunting's team on the main track, and could have stopped his train with safety to the same, and to the passengers and railroad employees on same, in his then situation, and could prudently have avoided collision with the team, his failure so to stop amounts to negligence, and renders the defendant liable for damages, and such liability attaches even though the plaintiffs contributed to the injury by their own carelessness or negligence." Bunting v. C. P. R. R. Co. 282.

66. The occurrence of a fire does not alone justify an inference of negligence, and in the absence of an explanation as to its origin, or evidence that it was in defendant's power to explain, or that by the exercise of reasonable care the fire would not have occurred, no presumption is raised to justify a submission to the jury whether the fire was caused by defendant's negligence. Whitworth v. Erie R. R. Co. 349.

NEGLIGENCE—*Continued.*

67. The fact that the defendant is the lessee of the road does not relieve it from the consequences of its own negligence, and it was bound to see that the road and equipment, whether owned or leased, was safe and sufficient between the points named on the passenger's ticket. Phila., etc., R. R. Co. *v.* Anderson, 407.

68. A., a passenger upon a railroad train, was unable, in consequence of the crowded condition of the cars, to obtain a seat. Although there was standing room inside he placed himself on or near the edge of the outside platform, and rode there for some distance, with his back against the end car window, holding on by a little iron rail affixed to the car. While in this position a jolt occurred, by which he was thrown upon the track and injured. Suit having been brought by him against the company to recover damages for the injury done him, *held*, that the court should have peremptorily instructed the jury that the plaintiff had been guilty of such contributory negligence as to defeat his right of recovery. Camden, etc., R. R. Co. *v.* Hoosey, 454.

69. Semble, that, as a general rule and under ordinary circumstances, it is the duty of a railroad company to provide every passenger with a seat, and that if a passenger exercising reasonable care and prudence is injured in consequence of the company's neglect of duty in this regard, the latter must respond in damages. Id.

70. The plaintiff sued as the administratrix of her late husband, who, whilst crossing the defendants' railway at a level crossing, was, through the negligence of the defendants, run over by an engine and sustained personal injuries which prevented him from following his occupation and earning wages, and caused him to incur expenses for medical attendance and nursing, whereby his personal estate was diminished in value: *held*, that the plaintiff could not sue in respect of damage to the intestate's estate arising, as above mentioned, from the tortious injury to the intestate's person, and that the action was therefore not maintainable. Pulling *v.* Great Eastern Ry. Co. 488.

71. An infant, to avoid the imputation of negligence, is bound only to exercise that degree of care which can reasonably be expected of one of its age. Byrne *v.* N. Y., etc., R. R. Co. 617.

72. Upon the death of the plaintiff, in an action by a husband for a wrongful injury to the person of his wife, the right to damages for loss of the wife's services and the expenses necessarily incurred by reason of the injury, survive to his personal representatives, as they are a pecuniary loss diminishing his estate; but the right of action for the loss of the society of his wife, and the comforts of that society, dies with him. Cregin *v.* Brooklyn, etc., R. R. Co. 619.

73. One may sue the company contracting to carry him, if he is injured while so conveyed, through the negligence of employees of another company which furnishes motive power. Keep *v.* Indianapolis, etc., R. R. Co. 615.

74. An instruction which does not consider defendant's negligence, if any, is erroneous. Atchison, etc., R. R. Co. *v.* Combs, 615.

75. Leaving the train while in motion. Secor *v.* Toledo, etc., R. R. Co. 616.

76. A father, if living, must sue for death of minor. St. Louis, etc., R. R. Co. *v.* Yocum, 617.

77. Duty of one using a dangerous crossing. Tucker *v.* Duncan, 617.

78. Where the railroad does not halt its train at a station a sufficient length of time to enable a passenger, by the use of reasonable diligence, to get off before it is started again, and it is so started while the passenger is in the act of alighting, whereby he is thrown down and injured, the company is liable. Strauss *v.* Kansas City, etc., R. R. Co. 384.

79. Where insufficient time is allowed a passenger for safe and convenient egress from the cars, and before he attempts to alight the train is started, and he then jumps from the train while its motion is so slight as to be almost imperceptible, and is injured, it is for the jury to determine, from the age and physical condition of the passenger, whether he is guilty of contributory negligence. Id.

80. If the train is stopped a sufficient length of time for the passenger to conveniently alight, and without any fault of defendant's servants he fails to do so,

NEGLIGENCE—*Continued.*

and the conductor, not knowing and having no reason to suspect that the passenger was in the act of alighting, caused the train to start while he was so alighting, then the company is not liable for the resulting injury. Id.

81. Where the conductor, after allowing a sufficient length of time for passengers to alight, starts the train before the passenger is in the act of getting off, and is therefore guilty of no negligence, and after the train is in motion the passenger who has been dilatory jumps from the train and is injured, he cannot recover. Id.

82. A railroad is liable for injuries to a passenger when occasioned by the negligence of a corporation which furnishes it with motive power. Keep v. Indianapolis, etc., R. R. Co. 389.

83. Railroads must use every test recognized by experts, as regards their motive power. Robinson v. N. Y., etc., R. R. Co. 392.

84. One who passed out of a railway car and got upon the platform thereof, and attempted to step or jump from the car while it was in motion, cannot recover for injuries suffered in consequence thereof, even though he had reached his place of destination, and the train, which had previously stopped to permit passengers to alight, had not so stopped for a reasonable length of time. Jewett v. Chicago, etc., R. R. Co. 879.

85. Complaint for injuries causing death must show pecuniary loss. Regan v. Chicago, etc., R. R. Co. 682.

See ANIMALS, 4, 5, 12; CARRIER, 76, 88; MASTER AND SERVANT; PLEADING AND PRACTICE, 6-19, 21, 25, 26, 30, 39-44, 46; SIGNALS.

NITRO-GLYCERINE.

Not negligence as regards employees for railroad to carry, 161.

See MASTER AND SERVANT, 6, 7.

PASSENGERS.

See CARRIERS; NEGLIGENCE.

PARENT AND CHILD.

See CHILDREN.

PHOTOGRAPH, ABSENCE OF, AS EVIDENCE, 168.

See PLEADING AND PRACTICE, 30.

PERSONAL PROPERTY.

The true owner may enforce his right, as against consignor, consignee, or carrier, 288.

See CARRIER, 7, 8.

PLEADING AND PRACTICE.

1. Where the defendant's counsel on the 16th day of the month withdrew from the case and on the same day other counsel were retained, who moved for a continuance to enable them to prepare for trial, which was refused, and the trial did not take place until the 23d of the same month, it was *held*, there was no abuse of discretion in denying the motion, calling for a reversal. Pennsylvania v. Snider.

2. A question to jurors asking them to state briefly their idea of the duties of a juror with a view of ascertaining whether they were men of sound judgment and well informed, is not proper for that or any other purpose. Id.

3. A mere technical error in the admission of evidence of an unimportant character is no ground for reversal. Id.

4. Evidence of what a flagman of a railroad company said and did at the time and just before a person about to take passage on a train was struck by another train passing on another track at a rapid speed, is pertinent in an action to recover for the injury, under an allegation that the company failed to keep a flagman at the spot to signal and warn of the approach of impending danger. Such allegation means more than that there was no flagman employed there. Id.

5. Where the court gives an instruction of its own in place of others refused.

PLEADING AND PRACTICE—*Continued.*
which fairly states the law of the case, the party asking those refused will have no cause of complaint. Id.

6. Under peculiar circumstances going to excuse the plaintiff from taking the usually necessary precautions to avoid danger, an instruction in a suit to recover for a personal injury from a passing train at the intersection of the track with a street crossing, that if the plaintiff knew of the existence of the track at the place of the injury, and that trains frequently passed along the same, and could have looked for and seen, or have listened and heard, the approaching train before going upon the track, and did not thus look and listen for the train, and that by reason of such neglect he failed to avoid the injury, may be properly refused, although ordinarily such an instruction should be given. Id.

7. A party is injured in a railroad accident, his injury brings on insanity, and about eight months after this accident he commits suicide in a fit of insanity. Under a State statute, giving to the personal representative of the deceased a right of action for death caused by negligence or default, the accident is too remote a cause of the death to be actionable. Scheffer *v.* Washington City R. R. Co. 38.

8. A complaint against a railroad company, alleging that its servants and agents managed and operated its locomotive and cars in such a recklessly and culpably negligent manner as to wilfully and wrongfully cause a team of horses to take fright and run away, and that, because of such fright, and while unmanageable and running away, they ran against the plaintiff's horse and caused its death, contains facts sufficient to constitute a cause of action. Billman *v.* Indianapolis, etc., R. R. Co. 41.

9. In such case, the fact, that between the wrongful act of the company and the injury complained of was an intervening cause, is not sufficient to defeat a recovery. An intervening agency does not always shield the wrong-doer from responsibility, where the injury flows from his wrongful act. Id.

10. The maxim, causa proxima, et non remota, spectatur, is not applicable to the case made in the complaint. Id.

11. Proximate or immediate and direct damages are the ordinary, natural, and usual results of an injury, and, being probable, may therefore be expected. Id.

12. In such case, the injury sued for was the usual and proximate result of the wrongful act of the company, showing, not passive negligence, but wanton and wilful wrong. Id.

13. In an action to recover damages for alleged negligence, plaintiff is entitled to have the issue of negligence submitted to the jury when it depends upon conflicting evidence, or on inferences to be drawn from circumstances in regard to which there is room for a difference of opinion among intelligent men. Payne *v.* Troy, etc., R. R. Co. 54.

14. In judging of negligence all the circumstances are to be taken into the account, and among others the age and sex of the person injured, so far as these are important. Michigan, etc., R. R. Co. *v.* Hassenmeyer, 60.

15. But it cannot be laid down as a rule of law that a less degree of care is required in a woman than in a man; and an instruction to that effect is erroneous. The rule of reasonable care and prudence knows nothing of sex. Id.

16. The complaint alleged the negligent construction, by the defendant, of a number of parallel railroad tracks across a public street at a point where the plaintiff was attempting to cross when injured; also the negligent condition of the sidewalk crossing such tracks; also the failure of the defendant to keep a watchman at such crossing, as required by an ordinance of the common council of the city within which were such street and crossing; also the failure of such employees to sound the whistle and ring the bell of the engine when approaching the crossing. The failure to sound the whistle having been proved by the plaintiff, the defendant offered in evidence another ordinance of such council, prohibiting the sounding of whistles and ringing of bells on engines while passing through the city. *Held*, that the exclusion of such evidence was erroneous. Pennsylvania Co. *v.* Hensil, 79.

17. It was erroneous to instruct the jury, in such case, that, if there was a

PLEADING AND PRACTICE—Continued.

...city ordinance requiring ... at railroad ... duty ... crossing, "then the order ... requirements without being ... ordinance ... not connected with the alleged ...

18. ... instruction should have treated ... Railroad ... was a proximate cause of the ...

19. ... the ... on the ... the defendant ... is ... that ... is constituting negligence ... ordinance ...

20. ... upon answers to ... which ... presents such question to the ... Terre Haute, etc., R. R. Co. ...

21. ... that defendant negligently ... and ... on the ... and ... said railroad ... Building & Water Co. ... defendant negligence ... contributory injury and ... plaintiff ... defendant's plea to the general ... The ... is required by statute ... a ... for any injury resulting from ... Indiana ...

22. ... and presents ... Indiana ... Co. v. Richardson ...

23. ... of water ... of ... answer ... existence ... Shaw v. ...

24. ... Indiana ... recover damages for ... the ... the ... Indiana ...

25. ... and that ... Indiana ...

26. ... Indiana ...

27. ... Indiana ...

PLEADING AND PRACTICE—*Continued.*

29. If the facts stated in the petition do not entitle plaintiff to relief, advantage may be taken of the defect by motion in arrest of judgment. Smith *v.* Burlington, etc., R. R. Co. 149.

30. The defendant offered in evidence a photograph of another street railway car, and proposed to prove that it was an exact representation of the car upon which the accident happened. On objection it was *held* that it might have been competent to have offered in evidence a photograph of the car upon which the accident happened, but not the photograph of another car, and then supplement the proof by showing that the two cars were alike. People's, etc., R. R. Co. *v.* Green, 168.

31. The plaintiff was allowed to testify that it was the usual custom of deceased during his married life to be at home after business hours, and that they had lived a happy married life. That for eight years prior to his death she had been an invalid and unable to leave the house, and that during that time he had been very kind and attentive, and that she was dependent upon him. The daughter of deceased was allowed to testify that he was kind as a father; that the social and domestic relations as to the family, on his part, were happy, and that he was kind and loving to plaintiff. The plaintiff was permitted to testify that after deceased had been taken to his home she discovered pieces of flesh. *Held*, the first and second points above stated are fully covered by Section 377, Code of Civil Procedure: "Such damages may be given as under all the circumstances of the case may be just," and by the decision in Beeson *v.* Green Mountain Gold and Silver Mining Co., 57 Cal. 20. Plaintiff sued as heir-at-law and as administratrix; in both respects the testimony of plaintiff's relations with deceased was admissible; in the latter respect testimony as to the relations of the father and daughter was admissible. Cook *v.* Clay, etc., R. R. Co. 175.

32. The testimony showed that deceased was fifty-nine years old, the surviving family consisting of his widow and daughter, twenty-three years of age; that he was a game and poultry dealer, and made a good, comfortable living for himself and family. The verdict was for $8000. The plaintiff was an invalid, having been for years dependent upon her husband. *Held*, the amount given by the jury could not be said to be more than, "under all the circumstances of the case," is just. Id.

33. The record showed that after the jury had retired and had been deliberating on their verdict for about nine hours, the court, without the knowledge or consent of the appellant, caused the jury to be informed through the bailiff having them in charge, that if they did not agree on a verdict the court would keep them there until Saturday night, a period of four days, to which action of the court the appellant at the proper time excepted. This action of the court cannot be justified. It constituted, as it must have been intended that it should, a kind of coercion on the jury, which was inconsistent with their proper independence. Terre Haute, etc., R. R. Co. *v.* Jackson, 178.

34. The St. Massachusetts of 1877, c. 282, enacting that the provisions of the Gen. Sts. c. 84, § 2, "prohibiting travelling on the Lord's day, shall not constitute a defence to an action against a common carrier of passengers for any tort or injury suffered by a person so travelling," does not apply to an action brought after it went into effect for an injury received before its enactment. Bercher *v.* Fitchburg R. R. Co., 212.

35. If a motion is not filed within the time prescribed by statute it is, for that reason, properly overruled; and the same result must follow when the filing is not within the time fixed by stipulation of the parties. Beems *v.* Chicago, etc., R. R. Co. 222.

36. Evidence of the number of decedent's family and of his accumulation of property was admitted and considered by the jury as to the standard of value of life of decedent, which was error for which the judgment must be reversed. Id.

37. There is no prejudice resulting to defendant from the want of agreement between the petition and instruction in the number of the names used to indicate the persons charged with negligence. Id.

38. Where in an action against a railroad company the jury returned a verdict against the company, and also made certain special findings of fact, and the

company made a motion for judgment upon those findings, the verdict to the contrary notwithstanding, which motion was overruled by the court, and thereafter the company made a motion to set aside the verdict and judgment and for a new trial, which motion was sustained, *held*, that as no judgment had been rendered against the company and no final order made against it, no petition in error would lie to review the action of the district court in refusing a judgment upon the special findings in favor of the company. Atchison, etc., R. R. Co. v. Brown, 238.

38. A verdict of $7,500 for the death of single man held to be excessive. Atchison, etc. R. R. Co. v. Brown, 238.

40. In a suit against a railroad company to recover damages for striking a person by a train of cars through negligence, a witness had been speaking of the train that struck the deceased. He was then asked: "State to the jury, in your opinion, how fast the train was going," which was claimed to be objectionable, as not being limited in time or to the particular train: *Held*, that the objection was not tenable. Penn. Coal Co. v. Conlan, 243.

41. As to matters which do not so far partake of the nature of a science as to require a course of previous habit or study in order to an attainment of a knowledge of them, the opinions of witnesses, though experts, are not admissible. Id.

42. The question of negligence is not one of law, but of fact, and must be proved like any other. Hence an instruction is properly refused which tells the jury as a matter of law, that certain facts per se constitute negligence. By this it is not meant that the definition of negligence is one of fact, to be determined by the jury. Id.

43. An instruction is properly refused which singles out an isolated fact, saying that it alone does not constitute wilful or wanton negligence, especially when the question does not hinge on such fact alone, and the instruction does not assume to be predicated upon the evidence. Id.

44. An instruction telling the jury, as a matter of law, that an ordinary swinging lantern, giving forth a white light, is a sufficient compliance with a city ordinance requiring "a brilliant and conspicuous light on the forward end of each locomotive," etc., is properly refused, as taking from the jury an inquiry of fact which it is their province to find from the evidence. Id.

45. To impeach a witness it must be shown that he wilfully and knowingly testified falsely in a material fact, and even then the jury are not compelled to disbelieve him as to other matters. They may do so, but should be left to exercise their judgment in that regard. Id.

46. Railroad employees are as worthy of belief as other agents. All agents and employees are presumed to be friendly to their employer, and on that account are usually subjected to a rigid cross-examination; but when this is done, their evidence must be weighed as other testimony, and its value estimated in connection with all the facts proven. Tucker v. Duncan, 268.

47. Certain special findings were requested by defendant, to which the jury returned answers that they "did not know" or "could not tell." *Held*, that as the answers had they been in favor of the defendant, would not have been inconsistent with the general verdict rendered, the indecisive answers were no ground for reversal. Lawrence v. Chicago, etc., R. R. Co. 274.

48. Where witnesses swear that they heard the ringing of the engine bell, and others swear that they were in a position to hear it if it had rung, and that they did not hear it, there is sufficient conflict in the evidence to be left to the jury. Butler v. C. P. R. R. Co. 282.

49. The following instruction sustained: "The jury are instructed that it is as much the duty of a railroad engineer to exercise prudence and caution in running his train so as to avoid injury to persons crossing a track, as it is the duty of such persons to avoid contact with the train. Therefore, if they believe from the evidence that the engineer who was driving the express train on the morning of June 12, 1877, had an opportunity to see Bunting's team on the main track, and could have stopped his train with safety to the same, and to the passengers and railroad employees on same, in his then situation, and could prudently have avoided collision with the team, his failure so to stop amounts to

PLEADING AND PRACTICE—*Continued.*
negligence, and renders the defendant liable for damages, and such liability attaches even though the plaintiffs contributed to the injury by their own carelessness or negligence." Id.

50. In the statutory proceeding by garnishment, in justice's court, jurisdiction must appear affirmatively from the record, and where that fails to show the affidavit required by the statute as the foundation of the proceeding, neither a docket entry that an affidavit was made and filed (not showing its contents), nor an appearance and submission to the court by the garnishee, can give validity to the judgment. Wells *v.* Amer. Ex. Co. 298.

51. Although the cause of action in the complaint, as last amended, is independent of the transactions between the parties and others in respect to the shipping and consignment of furniture, and the collection, upon the bill therefor, by defendant's agent, of the moneys consigned to W. & C., those facts were properly admitted in evidence to show W.'s exclusive ownership of the moneys so consigned. Id.

52. A petition under said act against a corporation for demanding and receiving excessive fare in the sale of a passenger ticket to a person desirous of travelling on its road between the points named on the ticket, is not bad, on demurrer, for want of an averment that the purchaser of the ticket was, in fact, transported on the ticket for which excessive fare was exacted.

53. A petition under said act is not bad for want of an averment that the excessive fare was paid by the plaintiff in the due course of business, although judgment was not rendered thereon until after said act was repealed by the Act of March 30, 1875 (72 Ohio L. 143), saving only pending actions and causes of action under the repealed statute, where the excessive fare was paid in the due course of business and not for the purpose of obtaining the penalty.

54. In such an action the plaintiff is a competent witness to testify as to the value of the goods, though he may not know the market value of such goods at the place of delivery. Perhaps the best way to arrive at the value of such goods would be to show the price in the market of new goods of the same character, and then show, as nearly as possible, the extent of depreciation from use. But such course is not open to a plaintiff when the defendant retains possession of the goods. In the matter of values, as in other matters, the law will give relief according to the injury, on the best testimony that can be obtained. Marsh *v.* Union Pacific R. R. Co. 359.

55. When there is reason to believe the amount returned by the jury is larger than the reasonable value of the property, plaintiff may be required to elect between an abatement of part thereof, or submit to a new trial. Electing to abate, new trial will not be ordered. Id.

56. The bringing suit upon the debt when due and recovery of judgment, does not estop the seller from suing the carrier for wrongful delivery. Bloomingdale *v.* Memphis, etc., R. R. Co. 371.

57. The plaintiff was improperly arrested for using a ticket which he had purchased of the company. Upon trial the court ruled that the plaintiff was entitled to recover damages for indignities which he had suffered at the hands of the police, for his mental suffering, and for sickness produced by a cold caught while confined. *Held*, that these results were too remote to come within the rule of damages applicable to an action of contract, and that the plaintiff's remedy for these wrongs is by an action of tort. Murdock *v.* Boston, etc., R. R. Co. 406.

58. Where questions should not have been allowed, but the answers thereto are unexceptionable, this court will not reverse therefor. Phila., etc., R. R. Co. *v.* Anderson, 407.

59. An assignment of error embracing in general terms all the charges and instructions given by the court, is too general, and will not be considered. Houston, etc., R. R. Co. *v.* Shafer, 421.

60. In a suit against a railway company for injury, which the plaintiff alleged he had received while a passenger, from the negligent and wrongful management of its train, his expressions indicating pain uttered after the alleged injury are admissible in evidence as part of the res gestæ. Whether his suffering was real or feigned was a question for the jury. Id.

PLEADING AND PRACTICE—*Continued.*

65. [illegible] sufficient to sustain a verdict for fifteen hundred dollars damages against a railway company, for producing a more aggravated condition of nervous than had before existed, caused by its cars running off the track, whereby plaintiff was shocked, and thus damaged. Id.

66. The plaintiff sued as the administratrix of her late husband, who, whilst crossing the defendants' railway at a level crossing was, through the negligence of the defendants, run over by an engine and sustained personal injuries which prevented him from following his occupation and earning wages, and caused him to incur expenses for medical attendance and nursing, whereby his personal estate was diminished in value. *Held*, that the plaintiff could not sue in respect of damage to the intestate's estate arising, as above mentioned, from the tortious injury to the intestate's person, and that the action was therefore not maintainable. Pulling v. Great Eastern Ry. Co. 498.

67. In an action brought, under 9 & 10 Vict. c. 93, for the benefit of the father of the deceased, evidence was given that the father, who was fifty-nine years of age, was nearly blind and injured in his leg and hands, and was not so able to work as he had been, but worked when he could; that the son used to contribute to his support; that five or six years previously, the father being out of work for six months, the son had assisted him pecuniarily out of his earnings, but had not done so since. *Held*, that there was evidence for the jury of pecuniary injury to the father from the son's death. Hetherington v. North Eastern Ry. Co. 498.

68. The Federal courts have jurisdiction in cases arising under the laws of the United States, or where a State is party. Railroad Co. v. Mississippi, 623.

69. Service in the State of foreign corporations. Mohr v. Ins. Cos. 620.

70. Where, after the commencement of an action, a third party becomes interested in the litigation by assuming the liabilities of the defendant in respect to the claim plaintiff is seeking to enforce, it is proper to allow a supplemental complaint bringing in such third party as a co-defendant. Prouty v. L. S., etc., R. R. Co. 621.

67. After a city had in its discretion constructed a track for the purposes named, a court cannot exercise a supervisory power over the location. Rice, etc., Co. v. Worcester, 624.

See ANIMALS, ATTACHMENT, CARRIER, 4, 80, 81; JURY, NEGLIGENCE, 3, 13-16, 22, 26, 27, 32, 36-42, 45, 48, 50, 51, 53, 57, 74, 76, 78.

PRINCIPAL AND AGENT.

See AGENT.

PROXIMATE CAUSE, 41.

See PLEADING AND PRACTICE, 10-12.

PUBLIC ENEMY.

See CONTRACT, 1; MOB, 1.

PUBLIC POLICY, 474.

See CONTRACT, 1.

RAILROAD COMMISSIONERS.

Have no jurisdiction as to costs. Foster v. Great Western Ry. Co. 595.

RECEIVER, 582.

A railroad company, whose property is temporarily in the hands of a receiver, will not be held liable for injuries caused by the negligent management of a locomotive by a person in the service of the receiver.

See ANIMALS, 7.

REDUCED RATE OF FARE, 318.

See CARRIER, 16.

RES GESTÆ.

See PLEADING AND PRACTICE, 19.

RIOT.

See MOB.

RUNAWAY HORSE, INJURY TO DRIVER OF, AT RAILWAY CROSSING, 35.

See NEGLIGENCE, 19.

SHIPPER. WHERE GOODS HAVE A STATED VALUE GIVEN BY SHIPPER, HE CANNOT RECOVER A LARGER AMOUNT, 298.

See CARRIER, 6.

SIDE TRACK. CONTRACT NOT TO BUILD IS VOID, AS AGAINST PUBLIC POLICY, 474.

See CONTRACT, 1.

SIGNALS.

When precautions as to signals are excused. E. T., etc., R. R. Co. *v.* Swaney, 615.

See NEGLIGENCE, 3, 5, 6, 17, 26-28, 34-36; PLEADING AND PRACTICE, 16-19.

SPECIAL RATE, 481.

See CARRIER, 71.

SPECIAL TICKETS, EXEMPTED FROM OPERATION OF STATUTES, 340.

See CARRIER, 19.

SPEED OF TRAINS.

See ANIMALS, 14; MASTER AND SERVANT, NEGLIGENCE, 31, 34-36.

STATION AGENT.

See AGENT.

STATION PLATFORM, FAILURE TO BUILD, 126.

See NEGLIGENCE, 45.

STATUTE, AS TO FREIGHT CHARGES.

See CONSTITUTIONAL LAW, 2-5.

——— AS TO HIGHWAYS.

See CONSTITUTIONAL LAW.

——— AS TO SUNDAY WORK.

See SUNDAY.

STOCK—STOCKHOLDER.

1. Where the stockholders having full knowledge of all the facts and an opportunity to move in the original suit before decree, or to file a bill immediately upon the rendition of the decree, failed to do either for a period of four years, and in the mean time the decree had been fully executed, the property sold thereunder to a new company and the sale confirmed, and the stock and bonds of the new company gone into the market, it is too late for them to obtain relief from a decree alleged to have been obtained by fraud. Pacific Railroad (of Missouri) *v.* Missouri Pacific R. R. Co. 621.

2. A corporation must pay costs as well as transfer stock, where it refuses to satisfy itself of the truth of the facts, as presented by one claiming to be a rightful owner. Iasigi *v.* Chicago, etc., R. R. Co. 595.

3. The assignment of subscriptions to stock to a railroad which has been consolidated with another company considered. Rodger *v.* Wells, 598.

4. A stockholder's liability to an execution creditor considered. Simpson *v.* Reynolds, 600; Stephens *v.* Fox, 600.

5. Right of stockholders. Taylor *v.* South, etc., R. R. Co. 602.

6. As to capital stock. Taylor *v.* South, etc., R. R. Co. 602.

STOCK—STOCKHOLDER—*Continued.*

7. Stockholders, rights of, in reorganization of company. Thornton v. Wabash R. R. Co. 602.

8. Stock, invalid when issued for unlawful purpose. Tobey v. Robinson, 602.

9. Subscription to stock, when payable. Cheraw, etc., R. R. Co. v. Garland, 604. Same v. White, 605.

See CORPORATION, LEASE.

STOP-OVER TICKET.

See CARRIER, 14, 15.

STOPPAGE IN TRANSITU.

Where the agent of a railroad delivers goods to consignee after the notice to stop them has been given, the company is liable, 371.

See CARRIER, 33-35, 64-68.

STREET RAILWAYS.

The city of New Orleans has no power under its charter and the laws of Louisiana to grant to a street railroad company the sole and exclusive right to the use of the public streets of the city for a street railroad. New Orleans, etc., R. R. Co. v. Crescent City R. R. Co. 622.

SUNDAY.

1. The Massachusetts St. of 1877, c. 283, enacting that the provisions of the Gen. Sts. c. 84, § 2, "prohibiting travelling on the Lord's day, shall not constitute a defence to an action against a common carrier of passengers for any tort or injury suffered by a person so travelling," does not apply to an action brought after it went into effect for an injury received before its enactment. Bucher v. Fitchburg R. R. Co. 212.

2. The legislative will is supreme on all questions appertaining to the observance of the Sabbath as a day of rest, and an act passed by such body for that purpose must be held constitutional, unless it abridges the civil rights or privileges of the citizens of the State. Commonwealth v. Louisville, etc., R. R. Co. 214.

3. Where works of necessity are exempted from the operation of the statute, the law regards that as necessary which the common sense of the country, in its ordinary mode of doing business, regards as necessity. Id.

See CARRIER, 1, 2; NEGLIGENCE, 58; PLEADING AND PRACTICE, 34.

SWITCH.

See HIGHWAYS, 5; NEGLIGENCE, 46; PLEADING AND PRACTICE, 27.

TAX.

1. A tax-payer paying under protest railroad tax to a treasurer, who threatened, as such, to enforce collection, should not be nonsuited when suing to recover under act of 1873. Cade v. Perrin, 628.

2. A tax levy slightly in excess of amount voted will not invalidate tax. Paris v. Reynolds, 587.

3. De facto deputy assessors, board of equalization. Texas, etc., R. R. Co. v. Harrison Co. 636.

4. Tax upon loans, bonds, stock, stock-dividend, considered. L. S., etc., R. R. Co. v. State, 628.

5. Double assessment of property, by board of equalization as track, and by local assessor as land. Proper practice is local assessment. Chicago, etc., R. R. Co. v. People, 627.

6. The sale of a railroad to enforce a statutory lien does not convey immunity from taxation. Wilson v. Gaines, 627.

7. Where the railroad has forfeited aid voted, the tax is released. Indianapolis, etc., R. R. Co. v. Tipton Co. 625.

THROUGH RATE, 358.

See CARRIER, 28.

TICKET.
As to special ticket, see CARRIER, 19; through tickets, see CARRIER, 74; limited tickets, see CARRIER, 17, 18.
See also CARRIER, 10, 14, 15.

TIMBER.
See LAND GRANT.

TITLE.
See LAND GRANT.

TRESPASSER, 1, 117.
See NEGLIGENCE, 1, 2, 6, 43, 44.

TRESTLE WORK, PERSONS WALKING UPON, 1.
See NEGLIGENCE, 1, 2, 6.

TRIP CHECK, 322.
See CARRIER, 15.

TURN TABLE, INJURIES TO CHILDREN PLAYING UPON, 182.
See NEGLIGENCE, 55.

VALUE OF FREIGHT, HOW PROVEN, 359.
See PLEADING AND PRACTICE, 53.

VENDOR AND PURCHASER.
See CARRIER, 66–68.

WHISTLE.
See SIGNALS.

WORK ON SUNDAY.
See SUNDAY LAW.

WORK OF NECESSITY, 194.
See CARRIER, 1, 2.



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